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LEADING CASES

ON

VARIOUS BRANCHES OF THE LAW:

With Notes.

THE LAW SOCIETY
LONDON
SOLD BY ORDER

VOL. II.

BY

JOHN WILLIAM SMITH, ESQ.,

OF THE INNER TEMPLE, BARRISTER AT LAW.

"It is ever good to relie upon the book at large; for many times *Compendia sunt dispendia*, and *melius est petere fontes quam sectari rivulos.*"—1 Inst. 305 b.

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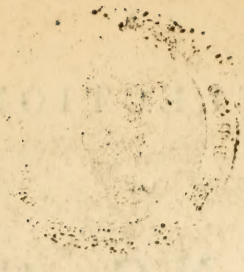

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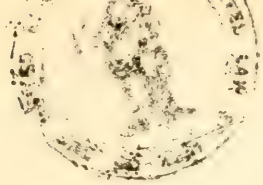
ADVERTISEMENT TO PART II.

THE reader is particularly requested to turn to page 408, and to insert a comma after the word *person* at line fourteen and efface the comma after *years* at line thirteen from the bottom of the left hand column, and to insert one after *time* in the following line ; so that the passage may read—

> " for the time of limitation does not begin to run till payment of rent from him to some third person, at the expiration of twenty years from which time, the right is acquired, not by the tenant, but by the third person to whom he so pays rent."

It was intended that this work should embrace a few more subjects, but great delay would have been caused by waiting to prepare them, and the publisher thought that it had been too long incomplete.



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CUTTER *v.* POWELL.

TRINITY.—35 *GEO.* 3.

[REPORTED 6 T. R., 320.]

If a sailor hired for a voyage take a promissory note from his employer for a certain sum, provided he proceed, continue and do his duty on board for the voyage, and before the arrival of the ship he dies, no wages can be claimed either on the contract or on a quantum meruit.

To assumpsit for work and labour done by the intestate, the defendant pleaded the general issue. And at the trial at Lancaster the jury found a verdict for the plaintiff for 31*l.* 10*s.*, subject to the opinion of this court on the following case:—

The defendant, being at Jamaica, subscribed and delivered to T. Cutter, the intestate, a note, whereof the following is a copy: "Ten days after the ship *Governor Parry*, myself master, arrives at Liverpool, I promise to pay to Mr. T. Cutter the sum of thirty guineas, provided he proceeds, continues and does his duty as second mate in the said ship from hence to the port of Liverpool. Kingston, July 31st, 1793." The ship *Governor Parry* sailed from Kingston on the 2d of August, 1793, and arrived in the port of Liverpool on the 9th of October following. T. Cutter went on board the ship on the 31st of July, 1793, and sailed in her on the 2d day of August, and proceeded, continued and did his duty as second mate in her from Kingston until his death, which happened on the 20th of September following, and before the ship's arrival in the port of Liverpool. The usual wages of a second mate of a ship on such a voyage, when shipped by the month out and home, is four pounds per month; but when seamen are shipped by the run from Jamaica to

England, a gross sum is usually given. The usual length of a voyage from Jamaica to Liverpool is about eight weeks.

This was argued last term by J. Haywood for the plaintiff, but the Court desired the case to stand over, that inquiries might be made relative to the usage in the commercial world on these kinds of agreements. It now appeared that there was no fixed settled usage (*) one way or the other; but several instances were mentioned as having happened within these two years, in some of which the merchants had paid the whole wages under circumstances similar to the present, and in others a proportionable part. The case was now again argued by

(*) See the notes to *Wigglesworth* v. *Dallison*, ante, vol. i. p. 307.

Chambre for the plaintiff, and *Wood* for the defendant.

Arguments for the plaintiff.—The plaintiff is entitled to recover a proportionable part of the wages on a *quantum meruit*, for work and labour done by the intestate during that part of the voyage that he lived and served the defendant; as in the ordinary case of a contract of hiring for a year, if the servant die during the year, his representatives are entitled to a proportionable part of his wages. If any defence can be set up against the present claim, it must arise either from some known general rule of law respecting marine service, or from the particular terms of the contract between these parties. But there is no such rule applicable to marine service in general as will prevent the plaintiff's recovering, neither will it be found, on consideration, that there is anything in the terms of this contract to defeat the present claim. It is indeed a general rule that freight is the mother of wages (†); and therefore if the voyage be not performed, and the owners receive no freight, the sailors lose their wages; though that has some exceptions where the voyage is lost by the fault of the owners, as if the ship be seized for a debt of the owners, or on account of having contraband goods on board: in either of which cases the sailors are entitled to their wages, though the voyage be not performed. *Vin. Abr.* "Mariners," 235. But here the rule itself does not apply, the voyage having been performed, and the owners having earned their freight. There is also another general rule, that if a sailor desert, he shall lose his wages; but that is founded upon public policy, and was introduced as a mean of preserving the ship. But that rule cannot apply to this case; for there the sailor forfeits

(†) See, on that subject, *Appleby* v. *Dods*, 3 East, 300; *The Neptune*, 1 Hagg. 227.

his wages by his own wrongful act, whereas here the seaman was prevented completing his contract by the act of God. So if a mariner be impressed, he does not forfeit his wages; for in *Wiggins* v. *Ingleton* (*a*), Lord Holt held that a seaman, who was impressed before the ship returned to the port of delivery, might recover wages *pro tanto*. Neither is there anything in the terms of this contract to prevent the plaintiff's recovering on a *quantum meruit*. The note is a security, and not an agreement: it is in the form of a promissory note, and was given by the master of the ship to the intestate to secure the payment of a gross sum of money, on condition that the intestate should be able to, and should actually, perform a given duty. The condition was inserted to prevent the desertion of the intestate, and to ensure his good conduct during the voyage. And in cases of this kind, the contract is to be construed liberally. In *Edwards* v. *Child* (*b*), where the mariners had given bonds to the East India Company not to demand their wages unless the ship returned to the port of London, it was held that as the ship had sailed to India, and had there delivered her outward-bound cargo, the mariners were entitled to their wages on the outward-bound voyage, though the ship was taken on her return to England. This note cannot be construed literally, for then the intestate would not have been entitled to anything, though he had lived and continued on board during the whole voyage, if he had been disabled by sickness from performing his duty. But even if this is to be considered as a contract between the parties, and the words of it are to be construed strictly, still the plaintiff is entitled to recover on a *quantum meruit*, because that contract does not apply to this case. The note was given for a specific sum to be paid in a given event; but that event has not happened, and the action is not brought on the note. The parties provided for one particular case: but there was no express contract for the case that has happened; and therefore the plaintiff may resort to an undertaking which the law implies, on a *quantum meruit* for work and labour done by the intestate. For though, as the condition in the note, which may be taken to be a condition precedent, was not complied with, the plaintiff cannot recover the sum which was to have been paid if the condition had been performed by the intestate, there is no

(*a*) 2 Ld. Raym. 1211.

(*b*) 2 Vern. 727.

reason why the representative of the seaman, who performed certain services for the defendant, should not recover something for the work and labour of the intestate, in a case to which the express contract does not apply.

Arguments on behalf of the defendant.—Nothing can be more clearly established than that where there is an express contract between the parties, they cannot resort to an implied one. It is only because the parties have not expressed what their agreement was, that the law implies what they would have agreed to do had they entered into a precise treaty; but when once they have expressed what their agreement was, the law will not imply any agreement at all. In this case the intestate and the defendant reduced their agreement into writing, by the terms of which they must now be bound. This is an entire and indivisible contract: the defendant engaged to pay a certain sum of money, provided the intestate *continued* to perform his duty during the whole voyage; that proviso is a condition precedent to the intestate or his representative claiming the money from the defendant, and that condition not having been performed, the plaintiff cannot now recover anything. If the parties had entered into no agreement, and the intestate had chosen to trust to the wages that he would have earned and might have recovered on a *quantum meruit*, he would only have been entitled to 8*l.*; instead of which, he expressly stipulated that he should receive thirty guineas, if he continued to perform his duty for the whole voyage. He preferred taking the chance of earning a large sum, in the event of his continuing on board during the whole voyage, to receiving a certain, but smaller, rate of wages for the time he should actually serve on board; and having made that election, his representative must be bound by it. In the common case of service, if a servant who is hired for a year die in the middle of it, his executor may recover part of his wages in proportion to the time of service (*a*); but if the servant agreed to receive a larger sum than the ordinary rate of wages, on the express condition of his serving the whole year, his executor would not be entitled to any part of such wages in the event of the servant dying before the expiration of the year. The title to marine wages by no means depends on the owners being entitled to freight; for if the sailors desert, or do not perform their

(*a*) The old law was otherwise; Vid. Bro. Abr. "Apportionment," pl. 13. ib. "Labourers," pl. 48. ib. "Contract," pl. 31. and *Worth* v. *Viner*, 3 Vin. Abr. 8 and 9.

duty, they are not entitled to wages, though the owners earn the freight. Nor is it conclusive against the defendant that the intestate was prevented fulfilling his contract by the act of God; for the same reason would apply to the loss of a ship, which may equally happen by the act of God, and without any default in the sailors; and yet in that case the sailors lose their wages. But there are other cases that bear equally hard upon contracting parties; and in which an innocent person must suffer, if the terms of his contract require it; *e. g.* the tenant of a house who covenants to pay rent, and who is bound to continue paying the rent, though the house be burned down (*a*). [*Lord Kenyon*, Ch. J. But that must be taken with some qualification; for where an action was brought for rent after the house was burned down, and the tenant applied to the Court of Chancery for an injunction, Lord C. Northington said that if the tenant would give up his lease, he should not be bound to pay the rent(*).] With regard to the case cited from 2 Lord Raym., the case of a mariner impressed is an excepted case, and the reason of that decision was founded on principles of public policy.

(*a*) Vide *Belfour* v. *Weston*, ante, 1 T. R. 310.

(*) Vide *Brown* v. *Quilter*, Ambl. 619. This doctrine is, however, now overruled. *Hare* v. *Groves*, 3 Anst. 687. *Holtzapffel* v. *Baker*, 18 Ves. 115. See *Bullock* v. *Dommitt*, 6 T. R. 650.

Lord Kenyon, Ch. J. I should be extremely sorry that in the decision of this case we should determine against what has been the received opinion in the mercantile world on contracts of this kind, because it is of great importance that the laws by which the contracts of so numerous and so useful a body of men as the sailors are supposed to be guided, should not be overturned. Whether these kind of notes are much in use among the seamen, we are not sufficiently informed; and the instances now stated to us from Liverpool are too recent to form anything like usage. But it seems to me at present that the decision of this case may proceed on the particular words of this contract and the precise facts here stated, without touching marine contracts in general. That where the parties have come to an express contract none can be implied, has prevailed so long as to be reduced to an axiom in the law. Here the defendant expressly promised to pay the intestate thirty guineas, provided *he proceeded, continued, and did his duty* as second mate in the ship from Jamaica to Liverpool; and the accompanying circumstances disclosed in the case are that the common rate of wages is four pounds per month, when

the party is paid in proportion to the time he serves; and that this voyage is generally performed in two months. Therefore, if there had been no contract between these parties, all that the intestate could have recovered on a *quantum meruit* for the voyage would have been eight pounds; whereas here the defendant contracted to pay thirty guineas, provided the mate continued to do his duty as mate during the whole voyage, in which case the latter would have received nearly four times as much as if he were paid for the number of months he served. He stipulated to receive the larger sum if the whole duty were performed, and nothing unless the whole of that duty were performed: it was a kind of insurance. On this particular contract my opinion is formed at present; at the same time I must say, that if we were assured that these notes are in universal use, and that the commercial world have received and acted upon them in a different sense, I should give up my own opinion.

Ashhurst, J. We cannot collect that there is any custom prevailing among merchants on these contracts; and therefore we have nothing to guide us but the terms of the contract itself. This is a written contract, and it speaks for itself. And as it is entire, and as the defendant's promise depends on a condition precedent to be performed by the other party, the condition must be performed before the other party is entitled to receive anything under it. It has been argued, however, that the plaintiff may now recover on a *quantum meruit;* but she has no right to desert the agreement, for wherever there is an express contract, the parties must be guided by it, and one party cannot relinquish or abide by it as it may suit his advantage. Here the intestate was, by the terms of his contract, to perform a given duty, before he could call upon the defendant to pay him anything: it was a condition precedent, without performing which the defendant is not liable. And that seems to me to conclude the question: the intestate did not perform the contract on his part; he was not indeed to blame for not doing it; but still as this was a condition precedent, and as he did not perform it, his representative is not entitled to recover.

Grose, J. In this case the plaintiff must either recover on the particular stipulation between the parties, or on some general known rule of law, the latter of which has

not been much relied upon. I have looked into the laws of Oleron; and I have seen a late case on this subject in the Court of Common Pleas, *Chandler* v. *Greaves* (*a*). I have also inquired into the practice of the merchants in the city, and have been informed that these contracts are not considered as divisible, and that the seaman must perform the voyage, otherwise he is not entitled to his wages; though I must add that the result of my inquiries has not been perfectly satisfactory, and therefore I do not rely upon it. The laws of Oleron are extremely favourable to the seamen; so much so, that if a sailor, who has agreed for a voyage, be taken ill and put on shore before the voyage is completed, he is nevertheless entitled to his whole wages, after deducting what has been laid out for him. In the case of *Chandler* v. *Greaves*, where the jury gave a verdict for the whole wages to the plaintiff, who was put on shore on account of a broken leg, the court refused to grant a new trial, though I do not know the precise grounds on which the court proceeded. However, in this case the agreement is conclusive; the defendant only engaged to pay the intestate on condition of his continuing to do his duty on board during the whole voyage; and the latter was to be entitled either to thirty guineas or to nothing, for such was the contract between the parties. And when we recollect how large a price was to be given in the event of the mate continuing on board during the whole voyage, instead of the small sum which is usually given per month, it may fairly be considered that the parties themselves understood that if the whole duty were performed, the mate was to receive the whole sum, and that he was not to receive anything unless he did continue on board during the whole voyage. That seems to me to be the situation in which the mate chose to put himself; and as the condition was not complied with, his representative cannot now recover anything. I believe, however, that in point of fact these notes are in common use, and perhaps it may be prudent not to determine this case until we have inquired whether or not there has been any decision upon them.

(*a*) Hil. 32 Geo. 3. C. B.

Lawrence, J. If we are to determine this case according to the terms of the instrument alone, the plaintiff is not entitled to recover, because it is an entire contract. In Salk. 65, there is a strong case to that effect; there debt

was brought upon a writing, by which the defendant's testator had appointed the plaintiff's testator to receive his rents, and promised to pay him 100*l.* per annum for his service; the plaintiff shewed that the defendant's testator died three quarters of a year after, during which time he served him, and he demanded 75*l.* for three quarters; after judgment for the plaintiff in the Common Pleas, the defendant brought a writ of error, and it was argued that without a full year's service nothing could be due, for that it was in nature of a condition precedent; that it being one consideration and one debt, it could not be divided: and this court were of that opinion, and reversed the judgment. With regard to the common case of a hired servant, to which this has been compared; such a servant, though hired in a general way, is considered to be hired with reference to the general understanding upon the subject, that the servant shall be entitled to his wages for the time he serves, though he do not continue in the service during the whole year. So if the plaintiff in this case could have proved any usage that persons in the situation of this mate are entitled to wages in proportion to the time they served, the plaintiff might have recovered according to that usage. But if this is to depend altogether on the terms of the contract itself, she cannot recover anything. As to the case of the impressed man, perhaps it is an excepted case; and I believe that in such cases the king's officers usually put another person on board to supply the place of the impressed man during the voyage, so that the service is still performed for the benefit of the owners of the ship.

Postea to the defendant,

Unless some other information relative to the usage in cases of this kind should be laid before the court before the end of this term: but the case was not mentioned again.

Few questions are of so frequent occurrence, or of so much practical importance, and at the same time so difficult to solve, as those in which the dispute is, whether an action can be brought by one who has entered into a special contract, part of which remains unperformed. We find it laid down in the treatises, that, in certain cases, the performance of, or readiness to perform one side of the contract is a condition precedent to the right to demand performance of the other side. And rules are given in the text-books for the purpose of enabling us to distinguish these cases from another class, in which no such condition exists, but the contractors are bound by mutual independent covenants or promises. (See the notes to *Pordage* v.

Cole, 1 Wms. Saund. 320, and to *Peeters* v. *Opie*, 2 Wms. Saund. 352.) We find it also laid down, that no action of *indebitatus assumpsit*, or upon a *quantum meruit*, can be brought for anything done under a special agreement which remains open, *Gordon* v. *Martin*, Fitzgibb. 303; *Hulle* v. *Heightman*, 2 East, 145; but that where the terms of the special agreement have been performed on one side, and nothing is to be done upon the other but a money payment, such payment may be enforced by an action of *indebitatus assumpsit*. *Cooke* v. *Munstone*, 1 B. & P. 354; B. N. P. 139; *Alcorne* v. *Westebrooke*, 1 Wils. 117. We also find that there are some cases in which work has been done, or goods supplied, under a special agreement, but not in conformity thereto, and yet the payment of a compensation is enforced by action, because that the defendant has retained and enjoyed the benefit of that which actually was done. *Farnsworth* v. *Garrard*, 1 Campb. 38, *Per Parke*, J. in *Read* v. *Rann*, 10 B. & C. 440. And lastly, there are cases in which, even while the special contract remains open, one party has been permitted to put an end to it, and to sue for what has been already done under it upon a *quantum meruit*. *Withers* v. *Reynolds*, 2 B & Ad. 882; *Planché* v. *Colburn*, 8 Bingh. 14. There is no difficulty in finding cases referable to each of the above classes, but the real difficulty is to determine, when a case occurs in practice, to which of them it is referable. In the present note it will be attempted to deduce from the decisions a few rules, likely to prove useful in the resolution of such a difficulty.

The question it is proposed to discuss is as follows. *In what cases may an action be brought by a person who has entered into a special contract against the person with whom he has contracted, while the plaintiff's own side of the contract remains unperformed?* Now as such an action, if brought, must necessarily be brought either on the contract itself, or in the form of *indebitatus assumpsit*, the above question subdivides itself into two branches:—

1. In what cases may the action be brought in special assumpsit upon the contract?

2. In what cases may it be brought in *indebitatus assumpsit*?

The former of these questions it would be wrong to discuss here at much length, because it has been treated by Sergeant *Williams*, in that clear and satisfactory style which distinguishes his writings, in the notes to *Pordage* v. *Cole*, 1 Wms. Saund. 320; and *Peeters* v. *Opie*, 2 Wms. Saund. 352. The result of the elaborate discussion contained in those notes is as follows:—

There are some special contracts in which the promises upon the one side are dependent on the promises upon the other side, so that no action can be maintained for non-performance of the former, without showing that the plaintiff has performed, or at least has been ready, if allowed, to perform the latter, the performance of which is said to be *a condition precedent* to his right of action. Of this description was the case of *Morton* v. *Lamb*, 7 T. R. 125, cited 2 Wms. Saund. 352 b., where the declaration averred, that in consideration that the plaintiff had bought of the defendant 200 quarters of wheat *at a certain price;* the defendant undertook to deliver it at a certain place in one month from the sale; and that the plaintiff was always, for one month from the sale, ready and willing to receive the wheat, but that the defendant did not deliver it. After verdict, the judgment was arrested, on the ground that the declaration ought to have averred, that the plaintiff was ready and willing to pay the stipulated price upon delivery; and the court said, that where two concurrent acts were to be done, the party who sues the other for non-performance, must aver that he has performed, or was ready to perform, his own part of the contract. In such cases as the one just cited, the matters to be done upon each side are said to be *concurrent acts*, because by right they ought to be done at the same time; and a readiness to perform his own side of the contract is a *condition precedent* to the right of either contractor to sue. Thus in agreements for the sale of real property, where one party agrees to convey, and the other to pay the price, the vendor cannot sue for the money without showing that he was ready to convey; nor the vendee

for a refusal to convey, without showing a readiness to pay the money. See *Glazebrook* v. *Woodrow*, 8 T. R. 366. There are other cases, in which one contractor must shew a readiness to perform his part before he can sue, but the other need not, as in the case cited in *Morton* v. *Lamb*, where a party was to pull down a wall and *then* to be paid for it; the pulling down was a condition precedent to the right to enforce payment; but a readiness to pay was not a condition precedent to the right to oblige the defendant to commence the work. Other cases there are in which neither of the contractors is subjected to any condition precedent to his right to enforce performance by the other of his part; but the promises on each side are independent of what is to be done upon the other. Such was the case of *Campbell* v. *Jones*, 6 T. R. 570; in which A. agreed, in consideration of a sum of money, to teach B. a particular method of bleaching for which he A. had a patent, and to allow B. to exercise that method during the continuance of the patent right. It was held that A. might sue for the money though he had not instructed B., who might on his side, if he pleased, sue for the neglect to instruct him. In these cases *the promises* on the one side, not the performance of those promises, are the consideration for the promises upon the other side. In the former cases of *concurrent acts* and *conditions precedent*, the consideration is the *performance*, not the promises. *Hobart*, 106. See *Franklin* v. *Miller*, 4 A. & E. 599.

The question whether the acts stipulated for in a given contract are concurrent, or whether performance, or readiness to perform, upon either side, be a condition precedent to the right to enforce performance on the other, is to be solved not by any technical rules, but by ascertaining, if possible, the intention of the parties, 1 T. R. 645. In order to discover that intention, the following rules are laid down by Serjeant *Williams*, 1 Wms. Saund. 319 b, *in notis*.

1. "If a day be appointed for payment of money, or part of it, or for doing any other act, and the day *is* to happen, or *may* happen, before the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act, *before* performance; for it appears that the party relied upon his *remedy*, and did not intend to make the performance a condition precedent: and so it is where no time is fixed for the performance of that which is the consideration of the money or other act."

2. "When a day is appointed for the payment of money, &c., and the day is to happen *after* the thing which is the consideration of the money, &c. is to be performed, no action can be maintained for the money, &c. before performance."

3. "When a covenant, or promise, goes only to *part* of the consideration, and a breach thereof may be paid for in damages, it is an independent covenant or promise. And an action may be maintained for the breach of it by the defendant, without averring performance, or readiness, in the declaration. Such was the late case of *Stavers* v. *Curling*, 3 Bing. N. C. 355, which is a very strong example, for in that case the defendant's promises were expressed in the contract to be performable 'on the performance' of the plaintiff's, and were yet held to have been intended to be, and to be, independent." See also *Franklin* v. *Miller*, 4 Ad. & Ell. 599.

4. "When the mutual promises or covenants go to the whole consideration on both sides, they are mutual conditions, and performance must be averred."

5. "When two acts are to be done *at the same time*, as when A. covenants to convey an estate to B. on such a day, and in consideration thereof, B. covenants to pay A. a sum of money *on the same day*, neither can maintain an action without averring a performance, or an offer to perform, his own part, though it is not certain which of them is obliged to do the first act; and this particularly applies to cases of sale.

The authorities on which these rules depend, will be found cited and discussed in the notes by Serjeant *Williams* above referred to. 1 Wms. Saund. 320, n. 4; and 2 Wms. Saund. 352, n. 3. It is proper to add, that when it is laid down that *performance must be averred*, the meaning of that is, that the plaintiff must aver in his declaration, that he was *ready*

and willing to perform his part of the contract; and this averment will be proved by shewing that he called on the defendant to accomplish his. *Wilks* v. *Atkinson*, 1 Marsh, 412; *Levy* v. *Lord Herbert*, 7 Taunt. 314; 1 B. M. 56, by *Dallas*, L.C.J.

The next branch of the question proposed at the beginning of this note is—In what cases will an action of *indebitatus assumpsit* lie, while the special contract remains open? This is a question of great practical importance. And as the distinctions it involves are more than usually fine, and the authorities numerous, an attempt will be made classify them, and deduce from them one or two general rules.

In the first place, then, there is a numerous class of cases which establish the general proposition, that while a special contract remains open, *i. e.* unperformed, the party whose part of it is unperformed, cannot sue in *indebitatus assumpsit* to recover a compensation for what he has done, until the whole is completed. This principle is affirmed and acted on in *Cutter* v. *Powell*; it was also the ground of the decision in *Hulle* v. *Heightman*, 2 East, 145; a decision of considerable celebrity, and which is said in the judgment to have proceeded on the authority of *Weston* v. *Downes*, Dougl. 23; but *Weston* v. *Downes* belongs to a somewhat different class of cases: the action was there brought to recover back the price of a horse in consequence of a breach of warranty; so that it was not an attempt to obtain compensation for work done, or goods delivered under a special contract; but to recover money paid on a consideration which was alleged to have failed, and this the plaintiff, having accepted the horse, was not allowed to do. *Weston* and *Downes* therefore belongs to the same class with *Street* v. *Blay*, 2 B. & Ad. 456, which is now the leading case on that subject, and differs from *Hulle* v. *Heightman*, where the action was not for money had and received to recover back cash paid on a consideration which had failed, but for work and labour done under a special contract which had been only in part performed. In that case the plaintiff, who was a seaman, sued for wages. He proved a service on board the defendant's ship, from *Altona* to *London*. He further proved that, on arriving at London, the defendant refused to give the seamen victuals, and bade them go on shore, saying he could get plenty of their countrymen to go back for their victuals only. The plaintiff accordingly did go on shore,—that after some days the defendant required him to return on board, which he refused to do, saying he had the law of him. He had then commenced his action. The defendant put in the articles of agreement under which the plaintiff served, which shewed that he was hired from Altona to London and back again, and contained a special clause by which the plaintiff bound himself to demand no wages till the conclusion of the voyage. Upon these facts, *Le Blanc*, J. nonsuited the plaintiff, *on the ground that the special contract remained open and unrescinded*, and that the plaintiff should have sued on it, and not in *indebitatus assumpsit;* and the Court of King's Bench afterwards approved of that ruling.

The principle on which *Hulle* v. *Heightman* was decided has never since been questioned. Assuming the special contract to have remained open and unrescinded, the plaintiff was undoubtedly bound to sue on it, and not in *indebitatus assumpsit*. But whether the court was right in assuming that the special contract *did*, after what had taken place, remain open and unrescinded, is a very different question, and upon that question it is submitted that the argument of Mr. Gibbs was correct, when he contended that the special contract had been put an end to, and that the plaintiff had a right to treat it as having never existed, and to sue for his labour on a *quantum meruit*. And it is further submitted, that it is an invariably true proposition, that, wherever one of the parties to a special contract has, in an unqualified manner, refused to perform his side of the contract, or has disabled himself from performing it by his own act, the other party has, thereupon, a right to elect to rescind it, and may, on doing so, *immediately* sue on a *quantum meruit* for anything which he had done under it previously to the rescision; this it is apprehended is established by *Withers* v. *Reynolds*, 2 B. & Ad. 882; *Planché* v. *Colburn*, 8 Bing. 14; *Franklin*

v. *Miller*, 4 Ad. & Ell. 599, and other cases which will be presently cited and commented upon. Now in *Hulle* v. *Heightman*, the defendant had refused to perform his part of the contract, and the plaintiff had, by bringing his action on a *quantum meruit*, elected to rescind. It is submitted, therefore, that the case of *Hulle* v. *Heightman*, so far as it assumes that the special contract remained open, would not now be supported, unless, indeed, it can be so upon the following consideration, *viz.* it may be urged, that the question whether the acts of the defendant, Heightman, amounted to an absolute unqualified refusal to perform his part of the contract, was a question which ought to have been left to the jury, and that as the plaintiff's counsel did not require that it should be submitted to them, he must be taken to have acquiesced in the opinion of Mr. J. *Le Blanc*, that the circumstances did not amount to a rescision.

On the same principle with *Hulle* v. *Heightman* proceeded *Ellis* v. *Hamlin*, 3 Taunt. 52; *Rex* v. *Whittlebury*, 6 T. R. 467; *Spain* v. *Arnott*, 2 Stark. 256; *Turner* v. *Robinson*, 6 C. & P. 16; *Ridgway* v. *Hungerford Market Co.*, 3 A. & E. 171. (which latter were cases of servants discharged *for cause*, before the expiration of their year); *Jesse* v. *Roy*, 1 C. M. & R. 342; and *Sinclair* v. *Bowles*, 9 B. & C. 92., which is, perhaps, more often cited than any other case upon this subject. It was an action of *assumpsit* for work and labour and materials, and for goods sold. At the trial it appeared that the plaintiff had repaired three chandeliers for the defendant, and that 5*l.* was a reasonable price for the work and materials; but it was also proved by the defendant that the plaintiff, when he accepted the job, expressly agreed *to make them complete* for the 10*l.*, which he had failed in doing. The learned judge, *Parke*, J. nonsuited the plaintiff, giving him leave to move to enter a verdict for 5*l.*, but the court refused the rule, on the ground that the contract was entire, and that the defendant, not having completed his part, had no right to recover anything. The effect of this case was discussed in the later one of *Roberts* v. *Havelock*, 3 B. & Ad. 404. That was an action for work and materials; the plaintiff, a shipwright, had engaged to put a ship of the defendant *into thorough repair*. Before this had been completed, the plaintiff demanded payment for what he had already done, and refused to finish the job without. The defendant refused payment, and thereupon this action was brought; and a verdict having been found for the plaintiff, the defendant moved to set it aside, on the ground that the special contract was still open. The court refused a motion made, in pursuance of leave, to enter a nonsuit. "I have no doubt," said Lord *Tenterden*, "that the plaintiff was entitled to recover. In *Sinclair* v. *Bowles*, the contract was *to do a specific work for a specific sum*. There is nothing in this case amounting to a contract to do the whole repairs and make no demand till they are completed." From these words it may be thought that his Lordship's judgment proceeded on the ground that the performance of *the whole work* is not to be considered a condition precedent to the payment of *any part of the price*, excepting when the sum to be paid and the work to be done are both specified (unless, of course, in case of special terms in the agreement expressly imposing such condition); and certainly good reasons may be alleged in favour of such a doctrine, for when the price to be paid is a specified sum, as in *Sinclair* v. *Bowles*, it is clear that the court and jury can have no right to apportion that which the parties themselves have treated as entire, and to say that it shall be paid in instalments, contrary to the agreement, instead of in a round sum as provided by the agreement; but, where no price is specified, this difficulty does not arise, and perhaps the true and right presumption is, that the parties intended the payment to keep pace with the accrual of the benefit for which payment is to be made. But this, of course, can only be where the consideration is itself of an apportionable nature, for it is easy to put a case in which, though no price has been specified, yet the consideration is of so indivisible a nature, that it would be absurd to say that one part should be paid for before the remainder; as where a painter agrees to draw A.'s likeness, it would be absurd to

require A. to pay a rateable sum on account when half the face only had been finished: it is obvious that he has then received no benefit, and never will receive any, unless the likeness should be perfected. There are, however, cases, that, for instance, of *Roberts* v. *Havelock*, in which the consideration is in its nature apportionable, and there, if no entire sum have been agreed on as the price of the entire benefit, it would not be unjust to presume that the intention of the contractors was that the remuneration should keep pace with the consideration, and be recoverable *toties quoties* by action on a *quantum meruit*. This position (besides what is said by Lord *Tenterden*) is perhaps somewhat countenanced by *Withers* v. *Reynolds*, 2 B. & Ad. 882. That was assumpsit for not delivering straw according to the following agreement: "John Reynolds undertakes to supply Joseph Withers with wheat straw delivered at his premises till the 24th June, 1830, at the sum of 33*s*. per load of thirty-six trusses, to be delivered at the rate of three loads in a fortnight, and the said J. W. agrees to pay the said J. R. 33*s*. per load for each load so delivered from this day till the 24th June, 1830, according to the terms of this agreement." It appeared that the plaintiff had refused to pay for the straw *upon delivery*, and it was contended that he was not bound to do so, and that, as no time was named for the payment, he might defer it till the expiration of the contract, or that at all events the promises to deliver the straw and to pay for it were independent, and should be enforced by cross actions. But the court held that he had a right to be paid *toties quoties* on the delivery of each load, and that the plaintiff's refusal to do so gave him a right to rescind the contract, and that the plaintiff was therefore properly nonsuited. Such are the arguments in favour of the doctrine at which Lord *Tenterden* seems to have hinted in *Roberts* v. *Havelock*. At the same time, it must not be concealed, that the expressions of *Parke*, J., in that very case, lean the other way. "If," says his lordship, "there had been any specific contract by the plaintiff *for completing the work*, the argument of the defendant might have had much weight. But this was only a general employment of the plaintiff by the defendant, in the same way as all shipwrights are employed." Yet surely if the plaintiff had refused to *complete* on payment as he went along, an action would have lain against him. In *Withers* v. *Reynolds*, *Littledale*, J. expressly founds the decision upon the special wording of the contract, "for *each* load, &c., which he says imports that each load shall be paid for on delivery; and, indeed, if that case were decided on any other ground, it would be contrary to the opinion expressed by *Parke*, J. in *Oxendale* v. *Wetherall*, 9 B. & C. 386.

To return from this digression. In *Read* v. *Rann*, 10 B. & C. 439, recognised in *Broad* v. *Thomas*, 7 Bingh. 99, the doctrine of *Cutter* v. *Powell*, *Hulle* v. *Heightman*, and *Sinclair* v. *Bowles*, was again acted upon. In that case a ship-broker brought an action for commission for procuring a charterer for the defendant's ship. It was proved to be a custom in the city that, in such cases, if the bargain was perfected, the commission was five per cent., but, if the bargain went off, nothing was payable; and here it had gone off. The plaintiff was nonsuited. "The claim of the plaintiff," said *Parke*, J., "rests on the custom, and not on a *quantum meruit*. The custom presupposes a special contract, and, if that is not satisfied, no claim at all arises, for no other contract can be implied. In *some* cases, a special contract not executed may give rise to a claim in the nature of a *quantum meruit*, ex. gr. where a special contract has been made for goods, and goods sent not according to the contract have been retained by the party, there a claim for the value on a *quantum valebant* may be supported. But then from the circumstances a new contract may be implied."

The general rule being thus established, *viz.* that while the *special contract* remains unperformed, no action of *indebitatus assumpsit* can be brought for anything done under it, we now come to the exceptions from that rule: and the first of them is that adverted to by Mr. *J. Parke*, in the passage just cited. It consists of cases in which something has been done under a special contract, but not in strict accordance with the terms of that contract. In

such a case, the party cannot recover the remuneration stipulated for in the contract, because he has not done that which was to be the consideration for it. Still, if the other party have derived any benefit from his labour, it would be unjust to allow him to retain that without paying anything. The law therefore implies a promise on his part to pay such a remuneration as the benefit conferred upon him is reasonably worth, and, to recover that *quantum* of remuneration, an action of *indebitatus assumpsit* is maintainable. This is conceived to be a just expression of the rule of law, as it at present prevails. The cases on the subject are, however, extremely numerous, and in many instances at variance with each other; and as the subject is one of great general importance, it will perhaps be best and fairest to the reader to enter somewhat more at large upon it, even at the risk of prolixity.

The rule which was in early times observed upon this subject was diametrically opposite to that which now obtains. It was held, that, whenever anything was done under a special contract, but not in conformity thereto, the party for whom it was done must pay the stipulated price, and resort to a cross action to indemnify himself for the deficiency in the consideration. Thus it was held, in *Browne* v. *Davis*, 1794, cited 7 East, 479, *in notâ*, that the plaintiff, who had agreed to build a race-booth for twenty guineas, was entitled to recover the whole price, although the booth was so badly constructed that it fell down during the races, and it was admitted that a cross action would lie against the plaintiff. In *Templar* v. *M'Lachlan*, Feb. 6, 1806, 2 N. R., 136, an action was brought on an attorney's bill, and the defence was gross negligence in the plaintiff, who had allowed improper bail to justify. The evidence of negligence was held inadmissible, and the plaintiff recovered the whole amount of his bill; the court saying that the only case in which such evidence would be admissible was where the negligence was so great that the plaintiff had derived *no benefit at all*, and that there they would perhaps admit it, to prevent circuity. In *Mills* v. *Bainbridge*, cited 2 N. R. 136, injury from improper stowage was held to be no defence in an action for freight. However, in Trinity Term, 46 G. 3, (June 13, 1806,) the rule which now obtains was established by the decision of the K. B., in *Basten* v. *Butter*, 7 East, 479. That was an action of *assumpsit* for work and labour, and materials, brought by a carpenter, whom the defendant, a farmer, had employed to roof a linhay and a barn. The defendant, at *Nisi Prius*, offered to prove that the work had been done in a grossly improper manner. This evidence was rejected on the authority of *Brown* v. *Davis*, and a verdict found for the plaintiff, which the court set aside on the ground that the defence ought to have been admitted. This decision was followed by *Farnsworth* v. *Garrard*, 1 Camp. 38, which was also an action of *assumpsit* for work and labour, and materials, brought by the plaintiff, who had rebuilt the front of a house for the defendant. The defence was, that the house was so out of the perpendicular that it was in danger of falling. *Park*, for the plaintiff, objected, that this was only ground for a cross action; and he relied on *Templar* v. *M'Lachlan*. Lord *Ellenborough* admitted the evidence. "This action," said his lordship, "is founded on a claim for meritorious service: the plaintiff is to recover *what he deserves*. It is therefore to be considered how much he deserves, or if he deserve anything. If the defendant has derived no benefit from his services, he deserves nothing, and there must be a verdict against him. There was formerly considerable doubt upon this point. The late Mr. J. *Buller* thought—and I, in deference to so great an authority, have, at times, ruled the same way—that, in cases of this kind, a cross action for the negligence was necessary; but, that if the work be done, the plaintiff must recover for it. *I have since had a conference with the judges on the subject*, and I now consider this as the correct rule: *that if there has been no beneficial service, there shall be no pay; but if some benefit has been derived, though not to the extent expected, this shall go to the amount of the plaintiff's demand. The claim shall be co-extensive with the benefit.*" This case was followed by *Denew* v. *Daverell*, 3 Camp. 451, where the same rule was applied in an action by an auc-

tioneer against his employer. And *Poulton* v. *Lattimore*, 9 B. & C. 259, and *Street* v. *Blay*, 2 B. & Adol. 456, have established, beyond all doubt, that, even where there is an express warranty, and a breach of that warranty is the defect of consideration complained of, the defendant may, in an action for goods sold and delivered, give evidence of the breach of warranty in reduction of damages.

It is settled by *Street* v. *Blay*, and *Poulton* v. *Lattimore*, that where an article is warranted, and the warranty is not complied with, the vendee has three courses, any one of which he may pursue. 1. He may refuse to receive the article at all; 2. He may receive it, and bring a cross action for the breach of the warranty; or, 3. He may, without bringing a cross action, use the breach of warranty in reduction of the damages, in an action brought by the vendor for the price. It was once thought, and indeed laid down by Lord *Eldon*, in *Curtis* v. *Hannay*, 3 Esp. 83, that he might, on discovering the breach of warranty, rescind the contract, return the chattel, and, if he had paid the price, recover it back. This doctrine, which was opposed to *Weston* v. *Downes*, *ante*, p. 11, is, however, overruled by *Street* v. *Blay*, and *Gompertz* v. *Denton*, 1 C. & Mee, 205; 3 Tyrwh. 232; and it is clear that, though the non-compliance with the warranty will justify him in refusing to receive the chattel, it will not justify him in returning it, and suing to recover back the price; unless, indeed, he return it, having kept it only such a time as was necessary for a fair examination, in which case he cannot be considered as having received it at all. See *Okell* v. *Smith*, 1 Stark. 107; and the judgment in *Street* v. *Blay*. Thus if goods be sold by sample, the vendee has a right to a reasonable time to examine and compare them. *Lorymer* v. *Smith*, 1 B. & C. 1.

But though, as has been seen, *Street* v. *Blay* and *Poulton* v. *Lattimore* clearly establish that where there is a breach of warranty, that may be given in evidence in reduction, in an action of *indebitatus assumpsit* for the price, or a cross action may be brought upon the warranty, yet it is the opinion of a writer of great merit and learning (Mr. *Starkie*) that "where there is a specific bargain as to price, but no warranty, and goods inferior in value to those contracted for have been delivered, the vendee must, *where it is practicable to do so without prejudice*, return the goods, and thus rescind the contract *in toto*; and if he does not, must be taken to have acquiesced in the performance of the contract." Stark. Ev., vol. 2, p. 879, 2d edit. It is not apprehended that this position leads to any very extensive consequences, because, as it is confined by Mr. *Starkie* himself to those cases in which "it is *practicable* to return the goods without prejudice," it must not, it is presumed, be taken to apply to any case where the goods, from their nature, cannot be returned *in statu quo*; as, for instance, where they consist of bricks and mortar, put together in the shape of a house; nor can it, it is supposed, include any case in which the defect is of a latent nature, not immediately discoverable, since, in such a case, the vendee might keep the goods for a long time without finding it out; yet it would be hard if he were to lose his remedy upon discovering it. Nay, he might even have resold the goods with an express warranty against the defect in question, for the breach of which he would be subject to an action; and it would be hard to contend that he should have no remedy over. Neither, it is apprehended, can Mr. *Starkie's* position apply to any case in which the vendee's necessity for the goods is urgent, and where it is better for him to have goods worse than the description in the contract than to have none at all. In such a case he certainly cannot rescind the contract *without prejudice*. He may have chartered a vessel for the purpose of exporting them, which may be actually lying at demurrage;—he may have resold them, and be liable to a penalty for not delivering them by a certain day. In such cases it would be hard to ask him to return them, on pain of losing his remedy for breach of contract. The position, therefore, of Mr. *Starkie* applies to a comparatively small number of cases; and when we consider the difficulty of selecting those—when we consider what disputes would arise upon the question, whether the goods, in each particular case, could have been returned, and the contract re-

scinded, *without prejudice*—we cannot but wish that no such distinction should subsist; but that all cases of non-compliance with a contract should be governed by the simple rule laid down in *Street* v. *Blay*, as applicable to cases of warranty, and which gives the vendee his option, either to rescind the contract, by returning the article within a reasonable time for examination, or to bring an action for the breach of contract, or to use it in reduction of the damages in an action for the price.

As a rule of evidence, indeed, it may rationally enough be laid down, that if a question arise, during an action for the price of goods, whether they did or did not correspond with the sample or other description in the contract, the fact that the vendee received and kept them without remonstrance, may fairly be urged *to the jury* as raising a presumption, *in the absence of strong proof to the contrary*, that they corresponded with the bargain. But it is one thing to contend for a presumption of this sort, and another to establish a rule of law. A receipt in full raises a strong presumption of payment, but is not conclusive: why should the retainer of goods be more so?

Let us now see on what authority this position rests, and how far that authority is shaken by authority more recent than itself. The cases cited by Mr. *Starkie* in support of it are *Grimaldi* v. *White*, 4 Esp. 95; *Fisher* v. *Samuda*, 1 Camp. 190; *Groning* v. *Mendham*, 1 Stark, 257; *Hunt* v. *Silk*, 5 East, 449. The first observation on these cases is, that, with the exception of *Hunt* v. *Silk* (which will be shown not to support the position in question), they are *Nisi Prius* decisions.

Grimaldi v. *White*, 4 Esp. 95, is certainly an authority direct upon the point. There the plaintiff agreed to paint, for fifteen guineas, miniatures conformable to a specimen previously exhibited; the miniatures had been sent home to the defendant, who objected, but did not return them. In an action for work and labour he was not permitted to give evidence of their inferiority to the specimen exhibited.

The only answer that can be given to this case is by contending that it is overruled by subsequent authorities.

Fisher v. *Samuda*, 1 Camp. 190, was a special action of *assumpsit*. The declaration stated that, in consideration of the plaintiff's agreement to purchase a certain quantity of beer from the defendant, to be shipped to Gibraltar, the defendant undertook to deliver him good and sufficient beer for that purpose. Breach, that the beer delivered was not good or sufficient, assigning special damage in the re-sale.

It appeared that an action had been brought for the price of the beer in question, in which judgment had been allowed to go by default, and that on a writ of inquiry a verdict for the full amount of the price had been agreed on. Lord *Ellenborough* said that he thought the bad quality of the beer should have been given in evidence in the former action, and that the present action could not be maintained. But he suffered the cause to proceed, for the sake of convenience.

It then appeared that the beer was delivered in May, 1806, and that there was no offer to return it till December.

Lord *Ellenborough* thought that the plaintiff, by having kept it so long, must be taken to have acquiesced in the quality; and the defendant *had a verdict*.

The point firstly decided by Lord *Ellenborough* in this case, namely, that a vendee who by suffering judgment for the whole price has neglected an opportunity of obtaining a decision on the inferiority, if any, shall be estopped from afterwards bringing an action on that score, does not at all support the position contended for by Mr. *Starkie*. (It may be here cursorily observed that the rule laid down on this first point does not seem to hold good in every case, *è converso*, for in *Turner* v. *Robinson*, 5 B. & Ad. 789, the court allowed the misconduct of a servant to be used as a defence to an action for his wages, after the master had brought an action against the servant, and recovered damages for the same misconduct.) The point secondly ruled—if ruled—by his lordship, certainly does favour Mr. *Starkie's* view. But then his lordship seems to have left the lapse of time to the jury, and what he is reported to have said seems only to have been a recommendation to them to presume, from the long

silence, that the contract was duly performed. Indeed his words are—"The plaintiff must be presumed to have assented to its good quality, and have acquiesced in the due performance of the contract." If he had thought the lapse of time a substantive answer to the action, not a mere argument fit to be addressed to the jury, he would have nonsuited the plaintiff, whereas we see that the defendant had a verdict.

Groning v. *Mendham*, 1 Stark. 257, was an action for the price of clover seed; the defendant who had kept the seed was not permitted to go into evidence of their inferiority to the quality stipulated for, on the ground that he had given no notice of his intention to rescind the contract. This case also favours Mr. Starkie's doctrine; but it is hinted by *Bayley*, B., 1 C. & Mee, 838, that it has been overruled by *Poulton* v. *Lattimore*, 9 B. & C. 259, in which it was cited, as were also *Hopkins* v. *Appleby*, 1 Stark. 477, and *Milner* v. *Tucker*, 1 C. & P. 15.

With respect to *Hunt* v. *Silk*, 5 East, 449, in that case A. had agreed to take a house from B. and pay him 10*l.*, and B. was to execute a lease and repair within ten days. A. paid the 10*l.* and took possession. B. neglected to execute the lease or repair. A. having continued in possession of the house, it was held by Lord *Ellenborough* at N. P., and afterwards by the court, that he was too late to rescind the contract and recover back the 10*l.* as money had and received, but that his remedy was by action on the special agreement, which is in conformity with the decision in *Street* v. *Blay*, but does not seem to support the doctrine now under examination.

As to the *Nisi Prius* cases above stated, it may perhaps be doubted whether they, so far as they tend to establish the position laid down in the passage cited from Mr. Starkie's work, can be now treated as law. It seems clear from *Street* v. *Blay*, and *Poulton* v. *Lattimore*, that where there is a breach of an express warranty, the vendee may, though he have retained the goods, either give the breach in evidence in an action for the price, or sue upon the warranty, unless, perhaps, where he has, as in *Fisher* v. *Samuda*, suffered a judgment for the entire of the contract price. But what difference is there in reason between the effect of an express warranty and such a promise as was broken by the defendant in *Groning* v. *Mendham*, and *Grimaldi* v. *White*; or rather, what were the promises in those actions but express warranties? It is apprehended, that anything said at the time of making a contract, if it be not a mere representation, is an *express* warranty. See *Power* v. *Barham*, 4 Ad. & Ell. 473. *Allen* v. *Cameron*, 1 C. & Mee, 832, is another authority at variance, as is submitted, with *Groning* v. *Mendham*, and *Grimaldi* v. *White*. Indeed the former case is there said by *Bayley*, B., p. 838, to be shaken by *Poulton* v. *Lattimore*, and the same learned judge, on *Hopkins* v. *Appleby* being cited, asked "Whether what Lord *Ellenborough* then said was intended as a rule of law, or was it not to guide the conduct of the jury?" See p. 837. To the same effect is *Chapel* v. *Hickes*, 2 C. & M. 214.

It has been said in some cases, that the defendant, if he mean to contend that the benefit received was not that which he stipulated for, must give the plaintiff notice of his intention. However, the observation made on this subject by Lord Ellenborough, in *Basten* v. *Butter*, seems conclusive, viz. that if the plaintiff sue upon a *quantum meruit*, the very form of his own declaration gives him notice that the adequacy of the consideration may be disputed.

With respect to the quantum of reduction, it was said by *Parke*, J., in *Thornton* v. *Place*, 1 M. & Rob. 219, that "where a party engages to do certain specified work on certain specified terms, and in a certain specified manner, but in fact does not perform the work so as to correspond with the specification, he is not, of course, entitled to recover the price agreed on in the specification. Nor can he recover according to the actual value of the work, as if there had been no special contract. What the plaintiff is entitled to recover is the price agreed on in the specification, subject to a deduction, and the measure of that deduction is the sum it would take to alter the work so as to make it correspond with the specification." As there, perhaps, might be cases to which this rule could not be with perfect justice applied,

it probably was only laid down by the learned judge with reference to such as that immediately before him. In *Chappel* v. *Hickes*, 2 C. & M. 214, *Bayley*, B. says, "The rule is, that if the contract be not faithfully performed, the plaintiff shall be entitled only to recover the value of the work and materials supplied." Lord *Ellenborough's* rule laid down after consulting the judges in *Farnsworth* v. *Gerrard*, was, "The claim shall be co-extensive with the benefit."

The next exception to the general rule, that no action of *indebitatus assumpsit* will lie while the special contract remains unperformed, is to be found in a class of cases which establish the proposition, that when one party has absolutely refused to perform, or has incapacitated himself, from performing his side of the contract, the other party may rescind the contract, and sue for what he has already done under it, upon a *quantum meruit*. That he may rescind it upon an *absolute* refusal by the other party to perform his part, is proved by *Withers* v. *Reynolds*, the facts of which have been already stated. There, the plaintiff having refused to pay for the loads on delivery pursuant to his contract, the defendant was held entitled to rescind it. "If the plaintiff," said *Patteson*, J., "had merely failed to pay for any particular load, that, of itself, might not have been an excuse to the defendant for delivering no more straw; but the plaintiff here expressly refuses to pay for the loads as delivered, the defendant is therefore not liable for ceasing to perform his part of the contract." This case was commented on in *Franklin* v. *Miller*, 4 Ad. & Ell. 599; and the same doctrine laid down. "The rule is," said *Coleridge*, J., "that in rescinding, as in making a contract, both parties must concur. In *Withers* v. *Reynolds*, each load of straw was to be paid for on delivery. When the plaintiff said, that he would not pay for his loads on delivery, that was a *total* failure, and the plaintiff was no longer bound to deliver. In such a case it may be taken, that the party refusing has abandoned the contract." The refusal which is to authorise the rescision of the contract, must be an unqualified one. In *Lines* v. *Rees*, tried before Mr. J. *Coleridge*, at the Monmouthshire Summer Assizes, 1837, the action was *assumpsit* on a contract to build a house for a specified sum, with a count for work, and labour, and materials. It appeared that the house was not yet completed, but that a good deal of extra work had been done by the defendant's order; that the plaintiff had called on him to pay for all that had been done, and that he had replied "that he would not — perhaps never." On this evidence the plaintiff's counsel submitted that he was entitled to recover on a *quantum meruit* for the extra work, and also to treat the special contract as rescinded. *Coleridge*, J., admitted that this would have been so, had the refusal to pay been absolute and unqualified; but thought that, in this case, the refusal to pay must be construed with reference to the demand, which was made, so far as the work done under the contract was concerned, too soon. He therefore held the plaintiff entitled to recover only for the extras. This note of *Lines* v. *Rees* has been kindly perused, and its accuracy confirmed, by the defendant's counsel, Mr. Greaves. Where a party has incapacitated himself from performing his side of the contract, the same consequence follows as if he had absolutely refused to do so. *Robson* and *Sharpe* v. *Drummond*, 2 B. & Ad. 303, was an action by Sharpe and Robson, who were coach-makers, against the defendant, for not paying for a chariot which he had hired of Sharpe for five years, at 75 guineas per annum; Sharpe was to paint and keep it in repair. The defendant had contracted with Sharpe alone. When three years out of the five were expired, that person, having dissolved partnership with Robson, transferred the stock in trade, and, among other things, the chariot in question, to him. Robson offered to continue the contract with the defendant, who refused to have anything to say to him, but offered to complete his engagement with Sharpe. Sharpe, however, stated that that was now impossible. Under these circumstances, the court held, that the defendant had a right to rescind the contract, and decline to keep the chariot the remaining two years. "The fact," said *Parke*, J., "of Sharpe's having transferred his interest in the contract to Robson, was equivalent

to saying, 'I will not perform my part of the contract,' and this is an answer to the present action." On the same principle was decided *Planché* v. *Colburn*, 8 Bingh. 14, the facts of which will be presently stated.

It being, therefore, established, that where one contractor has absolutely refused to perform, or rendered himself incapable of performing, his part of the contract, the other contractor may, if he please, rescind, such act or such refusal being equivalent to a consent to the rescision; the remaining part of the proposition above stated is, that upon such rescision he has a right, if he have done anything under the contract, to sue *immediately* for compensation on a *quantum meruit*. That he should do so is consistent with reason and justice, for it is clear that the defendant cannot be allowed to take advantage of his own wrong, and screen himself from payment for what has been done by his own tortious refusal to perform his part of the contract, which refusal alone has enabled the plaintiff to rescind it. He cannot, however, recover on the special contract, and must, therefore, be entitled to sue upon a *quantum meruit*, founded on a promise implied by law, on the part of the defendant, to remunerate him for what he has done at his request; and, as an action on a *quantum meruit* is founded on a promise to pay on request, and there is no ground for implying any other sort of promise, he may, of course, bring his action *immediately*. This point is decided by *Planché* v. *Colburn and another*, 8 Bingh. 14. The declaration in that case stated that the defendants had engaged the plaintiff for 100*l.* to write a treatise on Costume and Ancient Armour, to be published in "The Juvenile Library;" that the plaintiff had written part, and was willing to complete and deliver the whole for insertion in that publication; but that the defendants would not publish it there, nor pay the sum of 100*l.* There was also the common count for work and labour.

At the trial it appeared that the plaintiff had been engaged on the terms above stated, that he had completed part of his work, that he had made a journey in order to inspect a collection of ancient armour, and made drawings therefrom: but that he had never tendered or delivered his performance to the defendants, they having finally abandoned the publication of "The Juvenile Library," on the ill success of some of the first numbers of the work.

The jury having found a verdict for the plaintiff with 50*l.* damages, the court was moved for a new trial. It was contended, that the plaintiff could not recover on the special contract, since he had not tendered or delivered his work, and that he could not recover on the *indebitatus* count for work and labour, because the special contract was still open. The court, however, refused the new trial, holding that, as the defendants had, by putting an end to "The Juvenile Library," incapacitated themselves from performing their engagement with the plaintiff to publish his work there, they must be taken to have abandoned the contract altogether; and that he might recover for what he had done, upon a *quantum meruit*. "The fact was," said *Tindal*, L. C. J., "that the defendants not only suspended, but actually put an end to 'The Juvenile Library.' They had broken their contract with the plaintiff; and an attempt was made, but quite unsuccessfully, to show that the plaintiff had afterwards entered into a new contract to allow them to publish his book as a separate work. I agree that when a special contract is in existence and open, the plaintiff cannot sue on a *quantum meruit*: part of the question, therefore, here was, whether the contract did exist or not. It distinctly appeared, that the work was finally abandoned, and the jury found that no new contract had been entered into. Under these circumstances, the plaintiff ought not to lose the fruit of his labour, and there is no ground for the application that has been made."

There is a class of cases which appear at first sight *exactly* similar to *Planché* v. *Colburn* and *Robson* v. *Drummond*, but which will be found, on closer inspection, to be distinguished by a peculiarity which it may be useful here to remark. I allude to those cases in which a servant, who has engaged to serve for a certain time at certain wages, is turned away by his master before the period for which he had en-

gaged to serve has expired. In such case it is clear that, if his dismissal be in consequence of his own misconduct, he will be entitled to no wages, for his faithful service is a condition precedent to his right to them, and that condition he has not performed, *Turner* v. *Robinson*, 6 C. & P. 15 ; 5 B. & Ad. 789. But, if the dismissal be unjust, the master cannot by his wrongful discharge prevent the servant from recovering due compensation. Such a case seems to range itself under the rule we have been just discussing. The master has absolutely refused to perform his contract with the servant, and it is apprehended that the servant has thereupon a right to rescind it, and to sue upon a *quantum meruit* for what he has already done under it. But though he *may* rescind the contract, he is not, it would seem, obliged to do so. He has a right, it would seem, to consider it still in existence, to treat the wrongful dismissal as no dismissal at all, and to demand, at the expiration of the time for which he was hired, the whole of his stipulated wages,—not on a *quantum meruit*, but by virtue of the special contract, his own part of which he may then safely aver that he has performed, his readiness to serve during the rest of the term being considered equivalent in law to actual service ; and it has been thought that he may sue in *indebitatus assumpsit*, that being no more than any creditor may do upon an *executed* special contract, and his action, though not special in its form, being still upon the special contract and supported by the same evidence by which a special count would be substantiated. *Gandell* v. *Pontigny*, 4 Campb. 375, is a direct authority in favour of these positions. That was an action brought by a clerk for his whole quarter's salary against his master, who had wrongfully dismissed him in the middle of a quarter ; the declaration only contained the common count for work and labour. Lord *Ellenborough* : " If the plaintiff was discharged without a sufficient cause, I think this action maintainable. Having served a part of the quarter, and being willing to serve the residue, in contemplation of law he may be considered to have served the whole. The defendant was therefore indebted to him for work and labour in the sum sought to be recovered." This peculiarity in the case of servants and agents wrongfully dismissed, results altogether from the doctrine of constructive service, which originated in decisions on the law of settlement ; and though it *may* be applicable to some other cases (see *Collins* v. *Price*, 5 Bingh. 132), it seems difficult to understand how it can be rationally applied to most other cases of special contract. For instance, in *Planché* v. *Colburn* it would have been impossible for Mr. Planché, with much show of reason, to contend that he had *constructively* written the whole treatise on armour, when, in point of fact, he only had finished half of it. It has, however, been applied to cases of servants, clerks, and agents ; and perhaps, therefore, the result of the authorities on this subject may be, that a clerk, servant, or agent, wrongfully dismissed, has his election of three remedies : *viz.*, that, 1. He may bring a special action for his master's breach of contract in dismissing him, and this remedy he may pursue immediately. *Pagani* v. *Gandolfi*, 2 C. & P. 370. 2. He may wait till the termination of the period for which he was hired, and may then perhaps, sue for his whole wages, in *indebitatus assumpsit*, relying on the doctrine of constructive service, *Gandell* v. *Pontigny ;* and see *Collins* v. *Price*, 5 Bingh. 132 ; *vide tamen* the observations of the judges in *Smith* v. *Hayward*, post. 3. He may treat the contract as rescinded, and may *immediately sue*, on a *quantum meruit*, for the work he actually performed, *Planché* v. *Colburn* ; but, in that case, as he sues on an implied contract arising out of actual services, he can only recover for the time that he *actually* served. This last was the point *really* decided by Lord *Tenterden*, in *Archard* v. *Horner*, 3 C. & P. 349, a case sometimes (though, it is submitted, inconsiderately) cited for the purpose of shewing that a servant wrongfully dismissed cannot, *after* the expiration of the term for which he was hired, sue in *indebitatus assumpsit* for a compensation for any longer period than he has actually served. In that case the plaintiffs declared on a special count stating a hiring for a year, adding a count for wages. It turned out that the hiring was for a year, determinable by a month's notice. Lord *Ten-*

terden held that they could not recover on the first count, on the ground of variance, nor on the second for more than the period of actual service; and as a sufficient sum had been paid to cover that, he directed a nonsuit. It would appear that in this case the action was commenced before the expiration of the term, and if so, Lord *Tenterden's* ruling is perfectly reconcilable with the case of *Gandell* v. *Pontigny;* and this it probably was which, on its being contended in *Ridgway* v. *Hungerford Market Co.*, 3 Ad. & Ell. 179, that the plaintiff, a dismissed clerk, who had waited till the expiration of the term before bringing his action, could not maintain *indebitatus assumpsit* for his whole wages, elicited from Mr. Justice *Coleridge* the remark, that "if it were necessary, he should have wished for time to consider how far this question is determined by the doctrine laid down by Lord *Tenterden,* in *Archard* v. *Horner.*" That the decision of Lord *Tenterden,* in *Archard* v. *Horner,* proceeded on the grounds above stated, has been since asserted by the court in *Smith* v. *Hayward,* B. R. Mich. 1837 MSS. In that case, which was extremely similar to *Archard* v. *Horner,* the plaintiff declared on a special contract for a year, with the *indebitatus* count, and failed upon the special count, by reason of a variance; the contract turning out to be determinable by three months' notice. On the *indebitatus* count he was defeated, as in *Archard* v. *Horner,* in consequence of having brought his action too soon. It must be admitted, that the judges in that case cast some reflections upon *Gandell* v. *Pontigny,* without, however, overruling it. It would not be right to quit this subject without noticing the case of *Eardly* v. *Price,* 2 N. R. 333, in which a different construction from any that has been yet suggested, was put upon a contract very similar to that in *Archard* v. *Horner.* The declaration contained a count for schooling, lodging, board, meat, drink, &c. The last count stated, that in consideration that the plaintiff had, at the request of the defendant, received J. W. as his scholar, and that J. W. had left the plaintiff's school without due notice, the defendant promised to pay the plaintiff as much money as he therefore reasonably deserved to have. It appeared that the defendant had sent J. W. to this plaintiff's school, and taken him away without notice, the terms of the school being that "a quarter's notice is required to be given before the removal of any young gentleman, or to pay for a quarter." The plaintiff having recovered for a quarter, it was contended, on a motion for a new trial, that the special count was not proved, and that the plaintiff could not recover on the *indebitatus* count, because that the consideration was not actually executed. The court, however, held it was so. "The terms of the school," said the L. *C. J.*, "are, that 30*l.* a year shall be paid; but that if the scholar be taken away without notice, an additional quarter shall be paid. Still, however, the thing to be paid for is, that which has been supplied. The price for half a year is 15*l.*; but, if at the end of half a year the scholar is taken away without a quarter's notice, the price for the first half year is to be 15*l. and* 7*l.* 10*s.*"

Assuming the position to be correct, that a servant or agent wrongfully dismissed, may wait till the expiration of the term, and then maintain *indebitatus assumpsit* for his whole wages, questions may arise as to his conduct in the intermediate time, and how far it may afford the master a defence; as, for instance, if he have before the expiration of his term hired himself to another master, and how far the first master may be entitled to his intermediate earnings, by virtue of the doctrine asserted in *Thompson* v. *Havelock,* 1 Campb. 529; *Diplock* v. *Blackburne,* 3 Camp. 43. See *Patmore* v. *Colburn,* 4 Tyrwh. 840.

BICKERDIKE *v.* BOLLMAN.

MICH.—27 *GEO.* 3, *in K. B.*

[REPORTED 1 T. R. 405.]

A., *a creditor of* B. *to the amount of* 115*l.* 3*s.* 8*d.*, *took his bill for* 20*l.* *on* C., *who had not then, nor afterwards, any effects of* B. *in his hands. The bill when due was dishonoured, and no notice thereof was given by* A. *to* B.; *still* A.*'s demand on the bill was not discharged, but he may sue out a commission of bankrupt against* B., *and his debt will support it.*

CASE for money had and received to and for the use of the bankrupt, before his bankruptcy. 2d count. On an account stated with the bankrupt. 3d. For money had and received to and for the use of the plaintiffs as assignees. 4th. An account stated with the assignees. Plea, *non assumpsit.*

This cause was tried at the last assizes for the county palatine of Lancaster before Buller, J., when the jury found a verdict for the plaintiffs, subject to the opinion of this court on the following case:

That the act of bankruptcy was committed in the middle of August, 1784. That in the month of August, 1784, the bankrupt was indebted to Greatrix and Co., the petitioning creditors, in 115*l.* 3*s.* 8*d.* That on the 15th of September, 1784, the bankrupt drew a bill for 20*l.* on the defendant (*a*), "who then until the time of the bankruptcy, and of the bill becoming due, was a creditor of the bankrupt," payable to Greatrix and Co. two months after date, and paid the same to them on account of their said debt; which bill was presented for payment on the 18th of November following, and dishonoured. That no notice of the non-payment of the bill was ever given by Greatrix and Co. to the bank-

(*a*) The words between the inverted commas were added by the court, on the argument, with the consent of both parties.

rupt, or left at his house. That Greatrix and Co. received the bill at Manchester on the 24th of November, between the hours of eleven and twelve at noon; but the post goes from London to Manchester in three days. The bankrupt then resided at Manchester; but in general secreted himself, and particularly on market-days, after the 20th of November, on which day a commission of bankrupt issued against him, and he was declared a bankrupt at Manchester under that commission, in the afternoon of the 24th of November, but at what hour did not appear; and that commission has since been superseded. Afterwards another commission was issued on the petition of Greatrix and Co.

The question for the opinion of the court is, whether the debt, proved to be due to them under the circumstances above mentioned, is sufficient to support that commission?

Chambre, for the plaintiff, (after observing that the objection which had been raised to the petitioning creditor's debt was, that the bankrupt was to be considered as discharged from the bill for 20*l.*, which he had drawn in favour of the petitioning creditor, no notice having been given to the bankrupt of the bill's having been dishonoured,) made three questions:

1st. That no notice was necessary to be given to the bankrupt in this case. 2dly. That even if notice were necessary, it had virtually been given. 3dly. That it was not competent to the defendant in this action to make the objection.

As to the first, notice must in general be given; but most of the cases have arisen where the holder has given indulgence to the acceptor, by which he is considered as having made his election, to look to the acceptor only for payment. The reason on which the rule, requiring notice to be given to the drawer, is founded, is on a supposition that he may have effects in the hands of the drawee, and that he ought to have an opportunity of recovering satisfaction from him; and a presumption arises that the drawer will suffer from the probable insolvency of the drawee, in consequence of the holder's neglecting to give notice. But in this case that presumption is repelled by stating that the bankrupt was a debtor to the drawee; therefore the rule does not apply. By an ordinance of France (*a*), the drawer, in order to discharge himself from the payment of a bill

(*a*) Postlethw. tit. Bills of Exchange, 16 and 17 art.

on account of his not having had notice of the non-acceptance by the drawee, must shew that he had effects in the other's hands at the time of drawing. The rule requiring notice to be given to the drawer was introduced for his protection, and therefore ought not to be abused so far as to enable him to do injustice.

Secondly. As this case does not fall within the reason on which the rule of law is founded, the bankrupt, not having had effects in the hands of the drawee at the time that the bill was drawn, must be considered as having had virtual notice that the bill was not honoured. Supposing, however, that the rule of law would be inflexible in an action on the bill itself, yet the question here is not altogether whether the drawer can be resorted to on the bill, but whether the circumstances here stated extinguish the preceding debt. But it has been repeatedly held that the mere drawing of a bill of exchange does not extinguish the preceding debt.

Thirdly. The case of *Quantock* and others against *England* (*a*) is decisive. On a question whether a debt barred by the statute of limitations was sufficient to found a commission of bankrupt upon, Lord Mansfield said, "The statute of limitations does not destroy the debt; it only takes away the remedy. Here the debtor himself has not objected; he has submitted to the commission, and been examined under it; therefore the objection does not now lie in the mouth of a third person;" and he said that *Swain* and *Wallinger* (*b*) was in point. In this case the notice to be given was for the benefit of the bankrupt, and the slightest acknowledgment would be considered as a waiver of it.

(*a*) 5 Burr. 2628. 2 Black. Rep. 702. S. C.

(*b*) 2 Str. 746.

Buller, J. The bankrupt himself could not waive it after the bankruptcy.

Chambre. But the assignees may waive it for the purpose of supporting the commission.

Law, *contra*. The debt of the petitioning creditor being reduced under 100*l*. by the bankrupt's drawing the bill in question, is as much discharged by the laches of the holder in not giving notice of the non-acceptance of the drawee, as by actual payment. And as to the assignees waiving this objection, it is no answer in the present action. For in all cases where actions are brought by the assignees of a bankrupt, they must make out a clear title, which they

cannot do without proving a legal debt of the petitioning creditor; and they cannot by their own act make that a good debt which would not be so otherwise.

As to notice not having been necessary because the drawer had no effects in the drawee's hands, that goes to measuring the inconvenience which would result in every particular case from not giving notice. But the court have always said that, whether any actual change of circumstance has or has not taken place, or whether the drawer may or may not have suffered from the negligence of the holder in not having given notice in due time, it is a strict rule of law introduced for the sake of certainty, and that the drawer may have an opportunity of resorting to the drawee. In the case of *Peach* and *Burgess* (*a*), where a question arose upon the necessity of notice being given to the drawer, it was contended that no change of circumstances had taken place, or probable inconvenience had ensued, from want of notice; but Lord Mansfield said, it was a strict rule of law that notice should be given, and it must be adhered to in every case. This case does not come within the rules laid down in the cases of *Tindal* and *Brown*, or *Medcalf* and *Hall* (*b*), as to what shall be deemed sufficient notice of non-payment or non-acceptance; because here there was no notice at all. It was said by Lee, in arguing the case of *Russell* and *Langstaff* (*c*), and not denied by the court, that it had been frequently ruled by Lord Mansfield at Guildhall, that it is not an excuse for not demanding payment on a note or bill, or for not giving notice of non-payment, that the maker or acceptor has become a bankrupt, as many ways may remain of obtaining payment by the assistance of friends or otherwise.

(*a*) Sittings at Guildhall, cor. Lord Mansfield.

(*b*) Tr. 22 G. 3.

(*c*) Dougl. 497.

The bill's having been given after the act of bankruptcy, does not vary the present case; because a debt may be discharged in due course of trade, either by payment of the money after a secret act of bankruptcy, or by payment of the bill, or by dishonouring it.

With regard to the debt's being extinguished by taking this note from the bankrupt; by 3 and 4 Anne, c. 9, s. 7, it is enacted, that "if any person accept a bill of exchange for £20 or upwards, in satisfaction of any former debt, the same shall be accounted a full and complete payment of

such debt, if such person accepting of any such bill for his debt doth not take his due course to obtain payment thereof by endeavouring to get the same accepted and paid, and make his protest as aforesaid, either for non-acceptance or non-payment thereof." Here there was neither protest nor notice, and therefore the bill must be considered as complete payment.

Chambre, in reply, was stopped by the court.

Ashhurst, J. As to the general rule, it has never been disputed, that the want of notice to the drawer, after the dishonour of a bill, is tantamount to payment by him. But that rule is not without exceptions; and particularly in the case mentioned by the plaintiff's counsel, that notice is not necessary to be given where the drawer has no effects in the hands of the drawee (*a*); for it is a fraud in itself, and if that can be proved, the notice may be dispensed with. In this case it appears, that, at the time of drawing the bill, the drawer, so far from having any effects in the hands of the drawee, was actually indebted to him to a large amount.

(*a*) Vid. Gale v. Walsh, post, 5 vol. 239.

But even admitting this to be a general rule without any exception, it was certainly introduced for the benefit of the drawer. Now every rule may be waived by the person for whose benefit it is introduced. Under the circumstances of the present case, the drawer must be considered as having waived this benefit, because the commission is founded on that creditor's debt, between whom and the drawer this transaction has happened; and his submitting to it is a waiver of the want of notice, and an admission of the debt; which admission the assignees have subsequently confirmed by bringing this action. Therefore I think that as the bankrupt himself has not chosen to take advantage of it by moving to supersede the commission, it does not now lie in the mouth of a third person to do so.

Buller, J. The last point may be laid entirely out of the case, because, unless the objection be well founded in the case of the bankrupt himself, it is immaterial to consider how far it was competent for a third person to take advantage of it. The case of *Quantock* and *England* does not apply. There the question was, whether a third person should be permitted to avail himself of the statute of limitations. There might be good reasons for disallowing it in

that case, because the debt still remained in conscience. But here the question is, whether there was a sufficient debt to support the commission at the time when it issued.

The first point to be considered is, whether, under these circumstances, it was necessary to give notice within as short a time as could conveniently be done, that the bill was neither accepted nor paid. I am of opinion that no such notice was necessary. On the second trial of the cause of *Tindal* and *Brown* before me at Guildhall, the jury told me they found their verdict for the plaintiff on the ground that it had not appeared from the evidence that any injury had arisen to the party from want of notice. In consequence of which, upon the subsequent trial, I told the jury that where a bill was accepted, it was *primâ facie* evidence that there were effects of the drawer in the hands of the acceptor. The mistake of the jury on the former occasion had arisen from their taking it for granted that the drawer had not been injured by the want of notice, because he had not proved it, whereas that proof lay on the plaintiff to produce. And upon my mentioning this matter to the court, they thought that if there were no effects in the hands of the acceptor, that would vary the question very much, as the drawer could not be hurt.

The law requires notice to be given, for this reason, because it is presumed that the bill is drawn on account of the drawee's having effects of the drawer in his hands; and if the latter has notice that the bill is not accepted, or not paid, he may withdraw them immediately. But if he has no effects in the other's hands, then he cannot be injured for want of notice. Soon after I sat on this bench, I tried a cause at Guildhall, on a bill of exchange which was either drawn or accepted by a person residing in Holland, and a full special jury, under my direction, found a verdict for the plaintiff, notwithstanding no notice had been given to the drawer of the bill's having been dishonoured, because he had no effects in the hands of the person on whom the bill was drawn. That verdict never was objected to; and if it be proved on the part of the plaintiff that from the time the bill was drawn till the time it became due, the drawer never had any effects of the drawee in his hands, I think notice to the drawer is not necessary; for he must know whether he had effects in the hands of the drawee or not;

and if he had none, he had no right to draw upon him, and to expect payment from him; nor can he be injured by the non-payment of the bill, or the want of notice that it has been dishonoured. On these grounds I think the petitioning creditor's debt was sufficient to support the commission.

Besides, in the present case, as the plaintiff's counsel have truly argued, the question is not, whether an action could be maintained on the bill itself, but whether the want of notice extinguishes the debt. As to which the case is this. *A.* not having any effects in *C.*'s hands, draws a bill of exchange for 100*l.* on him, in favour of *B.*, for value received. Now if *C.* does not accept, and *B.* does not give notice to *A.*, there is an end of the bill. Then how does the case stand? *A.* has 100*l.* of *B.*'s in his hands, without any consideration, which therefore *B.* may undoubtedly recover in an action for money had and received.

Per Curiam.

Let the *Postea* be delivered to the plaintiffs.

So too in *Goodall* v. *Dolley*, 1 T. R. 712, in which case the action was brought against the payee, *Buller*, J. intimated that had the action been against the drawer, the case would have been governed by *Bickerdike* v. *Bollman*. And in *Rogers* v. *Stephens*, 2 T. R. 713, the decision was partly founded on *Bickerdike* v. *Bollman*, which *Grose*, J. said had been well considered; and in *Legge* v. *Thorpe*, 12 East, 171, an action was brought by the indorsee against the drawer of a foreign bill drawn on one Wyatt, the declaration negatived effects in the hands of the drawee or any consideration for the bill. It appeared at the trial that the defendant had no effects in Wyatt's hands, and that the latter had therefore refused to accept, but that Wyatt was one of the executors of a person called Weeks, and that Weeks's executors had desired the defendant to employ the payee of this bill to do some work on Weeks's property; and the defendant therefore drew this bill on Wyatt to settle with the payee, Wyatt denied that he had assets to pay the bill. The only question was, whether a protest for non-acceptance was necessary; Lord *Ellenborough* thought not, and the plaintiff had a verdict; and on a motion for a new trial, the whole court thought the case governed by *Bickerdike* v. *Bollman*, and discharged the rule. *Claridge* v. *Dalton*, 4 M. & S. 226, is another strong exemplification of this doctrine. There the drawer of a bill had no effects in the hands of the drawee, but had supplied him with goods upon a credit which would not, however, expire till long after the bill would become due. He was held not to be entitled to notice of its dishonour. "The case of *Bickerdike* v. *Bollman*," said Mr. J. *Bayley*, "has established, and, I am disposed to think, rightly, that a party who cannot be prejudiced by want of notice, shall not be entitled to require it."

But even in the very cases in which *Bickerdike* v. *Bollman* has been acted upon, it has been declared, that the rule established in that case must not be extended. In *Claridge* v. *Dalton*, Mr. J. *Le Blanc* went so far as to regret that any such decision had ever taken place. Accordingly it has been settled that the drawer is en-

titled to notice, though he had no effects in the drawee's hands when the bill was drawn or became due, if he had effects on their way to the drawee, *Rucker* v. *Hiller*, 3 Camp. 217; 16 East, 43. So it was laid down by Lord *Eldon* in a case of bankruptcy, that "if a bill were accepted *for the accommodation of the drawer*, and there were nothing but that between them, notice would not be necessary, the drawer being, as between him and the acceptor, first liable: but if bills were drawn *for the accommodation of the acceptor*, the transaction being for his benefit, there must be notice without effects; and if, in the result of various dealings, the surplus of accommodation is on his side, he is, with regard to the drawer, in the situation of an acceptor having effects, and the failure to give notice may be equally detrimental." *Exp. Heath*, 2 Ves. & Bea. 240; 2 Rose, 141. And this rule thus laid down by Lord *Eldon*, extends to cases where the drawer has reason to expect that some third party will provide for the payment of the bill; thus in *Corey* v. *Scott*, 3 B. & A. 619, where the bill was drawn and accepted for the accommodation of the first indorsee, the drawer was held to be entitled to notice: and the same point was decided in *Norton* v. *Pickering*, 8 B. & C. 610. And the same rule prevails though the person expected to provide funds be not a party to the bill, *Lafitte* v. *Slatter*, 6 Bing. 623. If the drawer have funds in the drawee's hands sufficient to meet the bill, even in part, though not wholly, he is entitled to notice, *Thackray* v. *Blackett*, 3 Campb. 164. If the drawer have made a provision to have funds in the drawee's hands to meet the bill, he has a right to notice, though the funds may not have actually arrived there, *Robins* v. *Gibson*, 3 Campb. 334. And if the drawer had effects at the time when the bill was drawn, he does not lose his right to notice, although before the time of payment he may have ceased to have any, *Orr* v. *Magennis*, 7 East, 359, or was indebted to the drawee in a larger sum, *Blackhan* v. *Doren*, 2 Camph. 503. These are strong cases, especially *Orr* v. *Magennis*, for there the drawer could, at the time when it fell due, have had no reasonable expectation that the bill would be paid, and could have sustained no prejudice from the want of notice; so that that case may be considered as going the length of deciding that if, at any time after the bill was issued, the drawer could have reasonably expected that it would be paid, he has a right to notice. Thus in *Hammond* v. *Dufresne*, 3 Campb. 145, it was held unnecessary that the effects should be in the drawee's hands when the bill was drawn, if they were there before it became due. Although it was said by Mr. J. *Bayley*, in *Claridge* v. *Dalton*, as above stated, "that a party who cannot be prejudiced by want of notice, shall not be entitled to require it," still the application of this *dictum* must be confined to the particular description of case then before the court; for we have seen that it does not extend to such a case as *Orr* v. *Magennis*. So, too, it is difficult to conceive how the drawer can be prejudiced by want of notice where the drawee has become bankrupt or notoriously insolvent. Yet, in both those cases, he is unquestionably entitled to it. *See Russell* v. *Langstaffe*, Dougl. 497, 515, referred to in the text. *Esdaile* v. *Sowerby*, 11 East, 114; and in *Dennis* v. *Morrice*, 3 Esp. 158, Lord *Kenyon* refused evidence tendered for the purpose of showing that the drawer was not prejudiced by want of notice. In fact, to use the words of the Lord C. J. and Mr. J. *Bosanquet*, in *Lafitte* v. *Slatter*, 6 Bingh. 627, "*Bickerdike* v. *Bollman* is an excepted case, the principle of which is not to be extended."

J'ANSON *v.* STUART.

EASTER.—27 *GEO.* 3.

[REPORTED 1 T. R. 748.]

To print of any person that he is a swindler is a libel, and actionable. A justification of such a charge must state the particular instances of fraud, by which the defendant means to support it.

THIS action was brought in the Common Pleas for a libel printed in the "Morning Post," which was stated in the declaration with *innuendos*, as follows:—

"The public cannot be too frequently cautioned against notorious swindlers and common informers. A nest of these hornets" (meaning the notorious swindlers and common informers), "who live by sucking the honey produced by industrious bees, have lately been discovered dividing the spoil at their nest in the corner of the King's Road" (meaning the dwelling-house of the plaintiff), "from whence" (meaning the said dwelling-house of the plaintiff) "they" (meaning the said notorious swindlers and common informers) "have heretofore" (meaning before the said time of printing and publishing the said libel) "issued to sting the unsuspecting" (meaning to insinuate and be understood thereby that the said plaintiff was illegally, fraudulently, and dishonestly concerned and connected with divers swindlers and common informers, and shared with them the spoil and plunder by them from other persons unlawfully, fraudulently, dishonestly, and by swindling, gotten and obtained). "The head of the gang" (meaning the plaintiff, and also meaning thereby that the plaintiff was the principal and head of the gang of the said swindlers and common informers) "possesses in a strong degree the attri-

butes of a gentleman called the Devil, who first seduces, then stimulates, and at last deceives, and leaves his dupes to punishment" (meaning thereby and intending to be thereby understood that the plaintiff was guilty of deceiving and defrauding divers persons with whom he had dealings and transactions, and that he the plaintiff was not to be trusted). "This diabolical character" (meaning the plaintiff) "like *Polyphemus*, the man-eater, has but one eye, and is well known to all persons acquainted with the name of a certain noble circumnavigator" (meaning by the said last-mentioned words to allude to the name of the plaintiff, *J'Anson;* and meaning thereby and intending that it should be thereby understood, that the said false, scandalous, malicious, and libellous words were applicable to, and published of and concerning, the said *W. J'Anson*).

The defendant pleaded that the plaintiff had been illegally, fraudulently, and dishonestly concerned and connected with, and was one of, a gang of swindlers and common informers, and had also been guilty of deceiving and defrauding divers persons with whom he had had dealings and transactions, wherefore he printed and published, &c.

To this plea there was a special demurrer, and the following causes were shown: that the defendant had not set forth or shown in or by his plea in what manner the plaintiff was illegally, fraudulently, and dishonestly concerned and connected with, and was one of, a gang of swindlers and common informers; and also that the defendant hath not thereby shown or disclosed any particular person or persons with whom the plaintiff was so illegally, fraudulently, and dishonestly concerned and connected; and also that the defendant has not shown or disclosed any particular person or persons with whom the plaintiff hath been guilty of deceiving or defrauding, or in what manner, or in what particular dealings and transactions, he hath so deceived and defrauded any such person or persons; and also that the defendant hath not in or by his plea set forth any day or time when the said several facts alleged by him in that plea against the plaintiff or any of them happened; and also that the defendant has set forth the charges in that plea contained in so general and uncertain a manner, that the plaintiff cannot know what particular facts the defendant will attempt to establish by evidence on the trial of this

cause in order to support those charges, and therefore cannot be prepared to disprove or answer the same.

After argument on this demurrer, the Court of Common Pleas (*a*) gave judgment for the defendant. The record was then removed into this court by a writ of error; and the errors assigned were similar to the causes of demurrer.

(*a*) H. 27 G. 3, C. B.

Wood, for the plaintiff, insisted that the plea of justification was too general and uncertain, because it did not sufficiently apprise the plaintiff of the defence which was intended to be set up. The defendant ought to have alleged some particular crime, with the time, the place, and the persons with whom the plaintiff was supposed to be connected. A similar justification was attempted to be pleaded in the case of *Newman* v. *Bailey* (*b*). That was an action by a justice of the peace against the defendant, who charged him with "pocketing all the fines and penalties forfeited by delinquents whom he convicted, without distributing them to the poor, or in any other manner accounting for a sum of 50*l.* then in hand." The defendant pleaded that "the plaintiff was a justice of the peace, and that, during the time he acted as such, he convicted divers and sundry persons respectively in divers and sundry fines and sums of money, for and on pretence of their having respectively committed divers respective offences, against the form and effect of divers statutes of this realm; which said respective fines and sums of money, amounting in the whole to 50*l.*, he received of the respective delinquents so by him convicted, and had not paid the same to the several persons to whom the same ought to have been paid by virtue of the respective statutes, but had kept and detained the same, contrary, &c." To this there was a special demurrer; and the court were clearly of opinion that the justification was bad, because it did not specify any one fine or penalty which had been unjustly levied.

(*b*) H. 16 G. 3, B. R.

Const for the defendant. The plea may be as general as the declaration; and, in the present case, the plea denies the whole charge. This is distinguishable from the case cited; for there was a specific charge that the plaintiff had taken certain fines which belonged to the king, and the justification was general. But here the point in issue was the whole life and character of the plaintiff; therefore it would have been to no purpose for the defendant to have

specified any one particular instance, because that would not have been sufficient to prove the charge in the declaration. And if the defendant had set forth many instances, he probably might have failed in the proof of one, and then his justification could not be supported. And besides, if it were necessary to specify all the charges, it would be making the record itself a libel. Pleas of justification need not be drawn with more precision and certainty than indictments: and there are several instances where a general charge of this kind is sufficient even in an indictment, such as charges of barratry; or keeping a common bawdy-house. 1 Hawk. P. C., 2 Hawk. P. C. c. 25, s. 59. In 2 Atk. 339, it is said, that in the case of an indictment for keeping a common bawdy-house, without charging any particular fact, though the charge be general, yet at the trial the prosecutor may give in evidence particular facts and the particular time of doing them: the same rule as to keeping a common gaming-house. So a general charge for keeping a disorderly house was held sufficient. 2 Burr. 1232. In the present case, the being a swindler consists in divers acts; and therefore it was sufficient for the defendant to plead the charge generally, and give the particular facts in evidence. But if it be not now too late to take any exception to the declaration, that appears to be informal and insufficient. It charges the defendant with having called the plaintiff a common informer and swindler: now the former is not actionable, and the latter is not a legal term of which the law can take notice. It is true, indeed, that they are explained by *innuendos* to mean defrauding and plundering; but the terms themselves are not capable of that explanation; therefore the defendant has a right to throw out the *innuendos*, and consider the charge itself. And if the matter be not actionable, the manner is not material. *Astley* v. *Young*, 2 Burr. 811. Besides, the libel is not sufficiently descriptive of the person of the plaintiff.

Wood in reply. The true nature of a plea is to disclose to the plaintiff the particular facts which are meant to be given in evidence against him: but this plea is so general, that the plaintiff cannot be prepared to answer it. As to the charge in the declaration being too general, it is to be observed that it is the charge of the defendant. And if it were not actionable on account of its generality, any per-

son might calumniate another with impunity by generally scandalising his character. This has been compared to an indictment for keeping a common bawdy-house, where it is said that a general allegation is sufficient: but even there the house itself must be specified; the time and the acts done are only the evidence of keeping an improper house. Suppose the plaintiff had been indicted for swindling, it would not have been sufficient to state, as this plea does, that he had been guilty of defrauding divers persons: but the indictment must have stated whom he had defrauded, and the time when. So an indictment generally for felony is not sufficient; it must allege the particular species of felony. Therefore on the defendant's argument this plea cannot be supported. Then as to the declaration not being sufficient: it is actionable to charge any person with that which may be the subject of an indictment. And there is no doubt, but that if the charge against the plaintiff were true, he might have been indicted for it. And even though certain words, which scandalise the character of another, be not actionable in themselves, yet if they be reduced to writing, they become the subject of a libel. *Austin* v. *Culpepper*, 2 Show. 313. And the innuendos are explanations in fact, which are admitted on this record.

Ashhurst, J.—This plea is bad, on account of its generality. The substance of the libel is, that the plaintiff was a common swindler, and that he, in concert with others, defrauded divers persons. One part of the defendant's arguments has been that this plea is only as general as the charge in the declaration. But it is to be observed, that it was the charge of the defendant, and the plaintiff was bound to state it as it was made. And it does not follow, that the defendant ought to justify in so general a way. The defendant is *primâ facie* to be considered as a wrongdoer. When he took upon himself to justify generally the charge of swindling, he must be prepared with the facts which constitute the charge, in order to maintain his plea: then he ought to state those facts specifically, to give the plaintiff an opportunity of denying them; for the plaintiff cannot come to the trial prepared to justify his whole life. If the plaintiff had been a common swindler, the defendant ought to have indicted him; but he has no right to libel him in this way. And if the defendant has acted wrong in

libelling the plaintiff, he has brought this difficulty upon himself: but where a man stands forth as a public prosecutor, he is entitled to the protection of the public. In some few cases, a general charge in an indictment may be sufficient; but those of barratry and keeping a disorderly house are almost the only instances. The latter case may be supported without mentioning the name of any individual who frequents the house, because it may be notorious to the neighbours that disorderly persons do go there, without their being enabled to specify any particular person. But where a charge of this kind is preferred, it must be more particular, in order to apprise the other party of it. Now here, if the defendant can support his charge that the plaintiff has defrauded divers persons, it must be known to him whom he has defrauded, and he must call them as witnesses to prove the particular acts of fraud: if he cannot substantiate his charge, he ought not to have made it.

Buller, J. It seems to me that the argument of the defendant's counsel blows hot and cold at the same time. For, first, it is said that the term "*Swindler*" imports a variety of acts of fraud, and therefore, that they could not be stated in the plea, because it would be multifarious. But the objection afterwards taken to the declaration, is that the term "*Swindler*" is too general, and cannot be legally understood. But Mr. *J. Aston* formerly held otherwise, for he said that the word "*Swindler*" was in general use, and that the court could not say they were ignorant of it. But at all events, we cannot say on this record that we do not understand the import of it, for it is explained to be "defrauding divers persons." The first question then here is, Whether the defendant is at liberty to charge the plaintiff with swindling, without showing any instances of it. That is contrary to every rule of pleading; for wherever one person charges another with fraud, he must know the particular instances on which his charge is founded, and therefore ought to disclose them. The rule in pleading is this, that wherever a subject comprehends multiplicity of matters, to avoid prolixity, generality of pleading is allowed; as a bond to return *all writs*, &c. But if there be anything specific in the subject, though consisting of a number of acts, they must be all enumerated; as on a covenant "to enfeoff of all his lands," the covenantor in showing perform-

ance must state them all; so if a person be bound "to pay all the legacies in the will," he must specify them all, and aver payment of each; and the reason is, because all these facts lie within the knowledge of the party (*a*). Now in the present case, if this plea were to be suffered, it would be to allow any person to libel another more on the records of the court than he could do in a public newspaper. If the plaintiff has been guilty of any acts of swindling, the defendant must be taken to know them. He could not prove the justification, as he has pleaded it, by general evidence; but he has no justification, unless he can prove the special instances; and, knowing them, he ought to put them on the record, that the plaintiff might be prepared to answer them. It has been said, that this case is different from that of *Newman* v. *Bailey*, because that was a specific charge. But that is not so; for there the plaintiff was charged with pocketing *all the fines*, &c., which was as general as possible. And there the court said it was necessary to specify the particular acts. The cases of indictments, which were cited, do not apply here. As to that of barratry, it has always been stated as an exception to the general rule: I have not been able to discover how that exception was first established; but it is of ancient date. But in that case something more is required than is stated in the present case; for though the indictment is good in a general form, yet it has always been held that the prosecutor must give the defendant notice before the trial of the particular instances that are meant to be proved; so that even there the inconvenience of allowing a general charge is guarded against. With respect to the case of an indictment for keeping a common bawdy-house, there more certainty in the indictment is required than is stated here; for it must state the place where the house is situate and the time; the crime therefore is particularly stated in that case, for the offence is the *keeping* of the house: and it is not necessary to prove who frequents the house, for that may be impossible; but if any unknown persons are proved to be there behaving disorderly, it is sufficient to support the indictment. So in the case of a common scold, it is not necessary to prove the particular expressions used; it is sufficient to prove generally that she is always scolding. Therefore in all these instances, the party is sufficiently apprised of the nature of the charge which is

(*a*) Cro. El. 749.

intended to be proved against him. It is not true, as was contended, that the general character of the plaintiff is put in issue; for the evidence to support the defendant's plea must be special. Where it is permitted to the party to give general evidence of character, as in the case of a prisoner, he cannot enter into particular instances: but where, as in the present case, the whole defence arises from the proof of particular facts, the general character is not in issue. Then as to the declaration itself, it contains as libellous a charge as can well be imagined.

Grose, J. declined giving any opinion, as he had argued this case at the bar in the court of Common Pleas.

Judgment reversed.

"THE rule of law respecting certainty in pleading, is laid down by *Buller*, J., in the text, *viz.*, "that where a subject comprehends multiplicity of matters, there, to avoid prolixity, generality of pleading is allowed, as in case of a bond to return *all* writs, or that the sub-collector of subsidies shall give an account in the Exchequer of *all* sums he has received; and the other party shall be put to shew a particular breach. But if there be anything specific in the subject, though consisting of a number of acts, they must be all enumerated. As, in a covenant to enfeoff of *all* his lands, the covenantor, in shewing performance, must state them all. So if a person be bound to pay *all* the legacies in a will, he must specify them *all*, and aver payment of each; and the reason is, because the facts lie within the knowledge of the party." See Co. Litt. 303 b.; Com. Di. Pleader, 2 V. 13, 2 W. 33, and the notes to *Cutler* v. *Southern*, 1 Wms. Saund. 116. But where a bond is conditioned for the performance of all the covenants in an indenture, a general performance may be pleaded, and it lies upon the other side to shew a breach in some particular. See *Lord Arlington* v. *Merricke*. 2 Saund. 411. Unless some of the covenants are in the negative, for then he must answer them specially. Co. Litt. 303; *Norton* v. *Syms*, Cro. Eliz. 691; 1 Wms. Saund. 117 *n.* 1; or in the disjunctive, for then he must shew *which* he has performed, *ibid.* In cases of conditions to *indemnify*, it is enough to say, that the plaintiff *was not damnified*. *Cox* v. *Joseph*, 5 T. R. 309, 1 Wms. Saund. 117 n. If, indeed, the condition be to discharge the plaintiff from some particular thing, the defendant must shew specially how he has done it; but if it be to discharge him from any damage by reason of that particular thing, then he need not, for that is, in reality, a condition to indemnify him against it. See the authorities. 1 Wms. Saund. *ibidem*.

The rule which requires certainty in pleading, is enforced with peculiar strictness in cases of justifications to actions of slander or libel; for the man propagating a charge derogatory to another's character, is, *primâ facie*, to be considered a *tort-feasor*, (*per Ashhurst*, J., *in the text, and Tindal*, C. J., in *Young* v. *Murphy*, 3 Bingh. N. C. 54,) he has done that which subjects him to a criminal prosecution, even if the charge be true. And it would be extremely hard, if the plaintiff, who risks his character upon the trial of the issue joined upon the plea of justification, were to be left in any uncertainty as to the precise nature of the accusation he undertakes to rebut. In such a case he is in fact and truth the defendant, though formally he appears plaintiff upon the record; since failure generally in-

flicts upon him a heavier punishment than the award of any amount of damages, however large, would prove to his accuser. Nay, in the older treatises upon crown law, it is laid down, that if a plea of justification, imputing an indictable offence, be found against the plaintiff, he may immediately be arraigned before the petty jury, as if a grand jury had found a true bill against him; the oaths of the twelve men who tried the issue, joined upon the plea of justification, being equivalent to those of the grand jurors. The doctrine, therefore, promulgated in the text, has been always followed up by our courts. See *Holmes* v. *Catesby*, 1 Taunt. 543; *Oliver* v. *Lord Wm. Bentinck*, 3 Taunt. 456; *Jones* v. *Stevens*, 11 Price, 235.

A plea of justification, therefore, to a declaration in slander, or libel, must contain a specific charge, set forth with certainty and particularity; and that charge must be as extensive as the imputation complained of in the declaration. A plea which justifies part only of a libel or slander, while it professes to justify the whole, is bad according to the common rules of pleading. *Johns* v. *Gittings*, Cro. Eliz. 239; *Clarkson* v. *Lawson*, 6 Bingh. 266; where the libel charged a proctor with being thrice suspended by Sir John Nicholl, and once by Lord Stowell; and the plea only alleged one suspension by Sir John Nicholl, accord. *Goodburne* v. *Bowman*, 9 Bingh. 532. And though, if a plea justify everything in the libel *that is essential*, it is a good answer. *Clarke* v. *Taylor*, 2 Bingh. N. C. 668, yet a plea will be bad which professes to justify that part only of a libel which is not essential, leaving out that part which gives the sting to the whole. That was the point in *Mountney* v. *Watton*, 2 B. & Ad. 673, in which case the plaintiff sued upon the following libel inserted in a newspaper:—

"Horse-stealer.

"C. M., a native of Derby, was taken into custody in this town, on Saturday night, on suspicion of having stolen a grey horse, the property of Mr. Thomas Adderley, of Stone, Shropshire. Information was given to Mr. Bowdler, solicitor, who happened to be constable for the night, that such a character was at the White Horse, Frankwell. Mr. B., with Heyward the police-officer, went in search of him, and found him asleep in bed. Heyward awoke him, and asked him where he had left the grey horse: he immediately answered 'Chester;' but on looking round, and observing who put the question, he denied all knowledge of the horse." The libel then went on to state that he had escaped and been retaken. And the declaration contained the following *innuendo*, viz.—"Then and there by the said libellous matter, intending and meaning that he, the said plaintiff, had been and was guilty of feloniously stealing a horse." The plea (a justification) was pleaded to the whole libel, "save and except as to the word '*horse-stealer*,' part of the said supposed libel." Upon demurrer, the court held the plea bad. "The gist of the whole matter imputed by this libel," said *Littledale*, J., "is contained in the word '*horse-stealer*;' the rest is a statement of facts, from which the imputation contained in that word is deduced. In such a case, I think the defendant cannot excuse parts of a libel, as grounded on matter of suspicion, unless he can justify that which is the result of the whole." Lord *Tenterden*, however, said that he did not mean to decide, that where an alleged libel is divisible, one part may not be justified separately from the rest. And *Parke*, J., said, he was rather of opinion it might be so. To the same effect as *Mountney* v. *Watton*, is *Roberts* v. *Brown*, 10 Bingh. 519.

BENT *v.* BAKER.

HIL. 29, *G.* 3.

[REPORTED 3 T. R. 27.]

A broker, who underwrites a policy of insurance after getting it underwritten by others, is a competent witness for the defendant in an action against any of those who underwrote before him. And if he had engaged to contribute to the defendant's costs, and has an action depending against himself on the same policy, and has joined as a plaintiff in a bill in equity for a discovery, the objections arising from these circumstances may be removed by the defendant's releasing him from any contribution to the costs in law or in equity; and by an offer, by himself and the defendant, to pay the costs in equity, and to dismiss the bill as to them. In general, a person is a competent witness, unless he be interested in the event of the suit: and in some cases even an interested person is a competent witness, from necessity.

THIS was an action of *assumpsit* on a policy of assurance brought in the court of Common Pleas, to which the defendant pleaded the general issue. At the trial before Lord Loughborough, at the Guildhall Sittings, the counsel for the defendant below produced one George Bowden, an insurance broker, as a witness, to prove circumstances tending to show that the underwriters on the same policy were not liable to pay the loss; who being sworn, said, that he was employed as a policybroker by the plaintiffs to procure the policy of assurance in the declaration mentioned to be subscribed by the defendant and the several other persons whose names are subscribed thereto as assurers. And that he, as such policy-broker, procured the same to be subscribed by the defendant as an assurer for 100*l.* in such manner as in the declaration is in that behalf mentioned;

and that he, within the space of one hour after the said policy had been so subscribed by the defendant, and the other persons whose names are subscribed thereto prior to the witness, subscribed the same policy for the sum of 200*l.*, and became an assurer to the said Peter Baker and John Dawson; and that an action had been commenced against him at the suit of the plaintiffs, and was then depending in his majesty's court of the Bench at Westminster, as such assurer for the said 200*l.*, for and in respect of the said loss alleged in the declaration; and in which action the same question was depending as in this action against the defendant; and that he expects to contribute to the expense of defending this action against the defendant. And also, that he, together with the defendant and several other underwriters upon the same policy, had filed a bill in equity in the court of Exchequer against the plaintiffs, for a discovery of divers matters respecting the policy and assurance, for the purpose of avoiding the same, and also praying to be relieved against the same; which bill in equity was then depending in the Court of Exchequer. And thereupon the counsel for the plaintiffs, on behalf of the plaintiffs, did then and there, before the said Chief Justice, object to the admission of the said George Bowden as a witness; and did then and there insist, that he was not a competent witness on behalf of the said defendant upon the issue joined between the said parties; whereupon the said defendant and his attorney produced a release duly executed by them to the said George Bowden, of all demands for any proportion or contribution of any costs, either at law or in equity, to be paid by him the said George Bowden; and it was then and there offered on behalf of the defendant and the witness, by their attorney, to pay to the plaintiffs the costs of the suit in equity, and that they would, at their own expense, procure the bill in equity to be dismissed as to them; but which offer the said plaintiffs did not accept, alleging that the said suit was still depending, and there were other plaintiffs therein besides the defendant and George Bowden; whereupon the said Chief Justice did then and there refuse to admit the evidence of the said George Bowden so offered as aforesaid. And the counsel for the defendant then excepted to the opinion of the Chief Justice, insisting that the said George Bowden was a competent witness for the

defendant touching the matters in question. The whole of this proceeding appeared on the bill of exceptions, which was tendered to and signed by Lord Loughborough. And it having been removed into this court by a writ of error, and errors assigned, it was now argued by Chambre for the plaintiff in error, and Wood for the defendants.

Arguments for the plaintiff in error:—

There seemed to be three objections to the competency of the witness: 1st, That he had a *direct interest in the suit*, inasmuch as he expected to contribute to the costs of it. 2dly, That he had an *interest in the question* put to him, as being an under-writer on the same policy. 3dly, That he had a *collateral interest*, arising from his being a party to a suit in equity which might be affected by the decision of this suit. In answer to the first: *primâ facie* every witness must be taken to be competent till the contrary appears; the plaintiff therefore should have shown some fact in this case to disqualify the witness. It should have been stated, that the witness was under *some engagement* to contribute to the costs; whereas it only appears that he *expected* so to do, which may mean a voluntary act. But even if there were any objection on this head, it was entirely cured by the release which was executed by both the defendant in the action and his attorney. As to the second objection, the general rule appears, from *R.* v. *Bray* (*a*), and *Abrahams* v. *Bunn* (*b*), to be, that a witness is competent unless he has an interest in *the event of the suit;* though there are, indeed, exceptions to that rule, one of which is supposed to be, that of an under-writer on the same policy in any action brought on that policy. But it is not necessary to contend here that this is not an exception to the rule, because it does not apply to this witness. He was not originally an under-writer on the policy for himself, but acted as agent for the persons for whom the policy was effected. And when he had discharged his duty as agent, he was a competent witness for each party: then he could not by any act of his own divest the parties of that right which they had in his testimony; still less could he do this by any act in concurrence with the assured themselves. In some cases, even though a person has an immediate interest in the suit, he must be admitted a witness from necessity; as where an agent of one person pays money to another, the agent is

(*a*) Rep. Temp. Hard. 358.
(*b*) 4 Burr. 2251.

actually interested in proving the payment, as he thereby discharges himself to his principal. And the admission of this witness will not be productive of such mischievous consequences as the rejection of his testimony; because, in contracts of this sort, much depends on the representation of the broker. The third objection cannot be carried farther than the second, because it arises from the interest which he had acquired to himself by improperly subscribing the policy after he had acted as an agent between the parties. Besides, it has been repeatedly determined that it must be a *direct*, and not a *consequential* interest only, to render a witness incompetent. *Carter* v. *Pearce*, *ante*, 1 T. R. p. 163; and *Bailey* v. *Wilson*, cited in *Abrahams* v. *Bunn*. And here it is to be observed, that this created no interest in the witness, nor even any bias on his mind; for this record could not affect the suit in equity. Here too the bill in equity could not have been affected by this verdict as against this witness, if it were obtained on his testimony alone: for as no man can recover on his own testimony, the court of equity would oblige him to make out his case on other evidence. At all events, the same answer may be given to this as to the first objection, that it was done away by the offer at the trial to dismiss the bill as to him, and to pay all the costs. In *Goodtitle* v. *Welford* (*a*), where the devisee in remainder of a copyhold estate was called to prove the sanity of the testatrix, on his offering to release all his interest to the heir at law, he was held to be a competent witness, although the heir at law refused to accept the release.

(*a*) Dougl. 134.

Arguments for the defendants in error: —

Whatever inconvenience may arise to the public from brokers under-writing policies of insurance in their own names, it must be remedied by the legislature: but the established rules of evidence cannot be broken. Though Bowden might possibly have been a competent witness to some purposes, *e. g.* to prove the subscription of any underwriter, because he would speak to that fact merely in his character of agent, yet he was incompetent for the purpose for which he was called, namely, to prove something in which he was equally interested with all the other underwriters. That interest was a fatal objection to his testimony; and the court will be the less inclined to overrule

this objection, because it was in the witness's power to have removed his incompetency by paying his subscription. It was expressly determined in *Ridout* v. *Johnson* (*a*), that one under-writer cannot be a witness in an action between other parties on the same policy. That rule has constantly prevailed since; and it shows, that if the witness be interested in the *question* put to him, it is the same objection as if he were interested in the *event of the suit*. There is also another rule which would defeat the evidence of this witness, that a party shall not be permitted to give testimony to avoid an instrument which he himself has executed. This was ruled in *Walton* v. *Shelly* (*b*), where the witness was even called to speak against his own interest; and there the rule respecting under-writers was recognised. As to the interest which it is contended the other under-writers had acquired in Bowden's testimony; that argument is entitled to little consideration, for they must be all taken to have subscribed at the same time; and the risk and the interest of the parties are the same. And if the plaintiff's argument were to hold, it would become necessary to consider at what time the witness became interested: but it has always been held to be a sufficient objection to a witness, that he is interested at the time of the trial. Otherwise the same argument would also apply to the case of commoners; and if one purchased his right of common a short time previous to the trial, he might be examined to any matter that arose before he became interested; since it might equally be said, that the other commoners had acquired a right in his testimony, of which he could not deprive them by becoming a commoner himself. As to the case of *Barlow* v. *Vowell* (*c*), where *Holt*, C. J. ruled, that a person who made himself a party in interest after a plaintiff or defendant had an interest in his testimony, could not deprive them of the benefit of his testimony, as if he be a witness of a wager, and afterwards bet on the same matter: that only shows that, after the wager, he is a competent witness to prove the contract itself, but nothing more. For in *Rescous* v. *Williams* (*d*), which was an action for money had and received against the defendant, in whose hands a wager had been deposited by the plaintiff and another, it was held, that a person who laid the same wager was not a competent witness for the party on whose side he betted. Now a

(*a*) Bull, N. P. 283. 1st ed., but omitted in the 2d.

(*b*) 1 T. R. 296; but see now *Jordaine* v. *Lashbrooke*, 7 T. R. 601; *Jones* v. *Brooke*, 4 Taunt. 464.

(*c*) Skin. 586. Bull, N. P. 290.

(*d*) 3 Lev. 152.

policy of assurance may be considered as analogous to a wager, and each under-writer has the same sort of interest which the bettor has in the case of a wager.

Chambre, in reply. The case of *Walton* v. *Shelly* did not establish, as a general position, that in no case can a witness be called to invalidate an instrument which he himself has signed; for in a case which happened soon afterwards at the sittings, *Buller*, J. held, that the rule only extended to *such instruments as are negotiable*:* so that it does not apply to a case like the present. But even if it were to be considered as a general rule, still the particular circumstances of this case furnish an exception to it. The case in Levinz is contrary to universal practice, and is answered by the rule laid down in Skinner, which is decisive on this head. It makes no difference here whether the objection to this witness arises from his being interested in the *question*, or in the *event of the cause:* since the release discharged him from every interest in both. Besides, he was rejected *generally:* now if he were competent to answer *any* question, there must be judgment for the plaintiff in error.

* And now see *Jordaine* v. *Lashbrooke*, 7 T. R. 601.

Lord *Kenyon*, C. J., after stating the case, said, the question is, Whether, under all these circumstances, Bowden was or was not a competent witness? I premise with mentioning what was said by Lord *Mansfield* (*a*) on this subject, That "the old cases upon the competency of witnesses, have gone upon very subtle grounds. But of late years, the courts have endeavoured as far as possible, consistent with those authorities, to let the objection go to the *credit*, rather than to the *competency* of a witness." And if the opinion of so great a judge stood in need of any support, it would have it from the sentiments of Lord *Hardwicke*, in the case of *King* v. *Bray* (*b*), who said, that whenever a question of this sort arose on which a doubt might be raised, he was always inclined to restrain it to the credit, rather than to the competency of the witness, making such observations to the jury as the nature of the case should require. Now, fortified with two such authorities as these, I have no scruple in declaring my concurrence that, wherever there are not any positive rules of law against it, it is better to receive the evidence of the witness, making, nevertheless, such observations on the credit of the party as his situation

(*a*) *Walton* v. *Shelly*, 1 vol. 300.

(*b*) Rep. Temp. Hard. 360.

requires. Then it is to be considered, What is the question put to a witness on his *voir dire?* It is, Is he really interested in the cause? Sometimes, indeed, the counsel enter into the detail, and ask *how* he is interested. But the general question involves in it all the others, and amounts to this, Whether the record in that cause will affect his interest (*a*)? Upon that ground has the case of commoners proceeded: it is very probable that in *prescriptive* rights of common, other persons living in the same manor may have correspondent rights; yet, unless the question turns on a *custom* equally beneficial to them all, the testimony of one must be admitted to prove his neighbour's right. But if the right be claimed under a *custom* that all the inhabitants of the parish shall have a right of common, all those who fall under that description are interested, because the verdict in that cause may afterwards be used as evidence to establish the same right in the rest.

(*a*) Vid. *Trelawney* v. *Thomas*, 1 H. Bl. Rep. C. B. 308.

Now in this case, the objections made to this witness are resolvable into the three mentioned by the plaintiff's counsel. First, that he had a direct interest in the suit. It is true that he had an interest when he came into court to give his evidence by virtue of that engagement which he had made; but the bill of exceptions also states that a release was executed to him, which entirely removed that objection. The next objection is, that the witness was party to a suit in equity, and that eventually he might be liable to the costs; but no person but the plaintiffs below could call on him for those costs. Now the defendant below and the witness offered that the bill should be dismissed as to them at their own costs, which, however, was refused; but after such a refusal, neither in justice or common sense can we suffer those parties to make the objection. Then the remaining objection is, that he was an underwriter on the same policy. I must acknowledge that there have been various opinions upon this subject, and that it is impossible to reconcile all the cases. Then we have only to consider what are the principles and good sense to be extracted from them all. I think the principle is this: if the proceedings in the cause cannot be used for him, he is a competent witness, although he may entertain wishes upon the subject, for that only goes to his credit, and not to his competency;

as where he stands in the same situation with the party for whom he is called to give evidence, there is no doubt but that it may influence his testimony; or where a father is giving evidence for the son: but this does not render him incompetent, and such circumstances are always open to observation. So here the witness might have had his wishes; his situation might have created an influence on his mind; but the question still is, whether he was a competent witness? On the grounds I have already stated, I think he was. But there is also another reason for admitting the evidence of this witness, on the authority of the case in Skinner; where it was ruled by Lord Ch. J. *Holt*, that where a person made himself a party in interest, after a plaintiff or defendant has an interest in his testimony, he may not by this deprive the plaintiff or defendant of the benefit of his testimony*. Then what was the situation of these parties? We must recollect that the broker, who effects the policy, is the witness whose testimony must be resorted to by both parties in case of any dispute. He afterwards signed the policy himself, which he could not have done without the concurrence of the assured themselves, who had before entered into the contract with the defendant below through the medium of this broker; and therefore he was to be deprived of the benefit of his witness by the very act of the plaintiffs themselves, who objected to his testimony at the trial. Then it has been said, that a person cannot be permitted to give evidence to invalidate an instrument which he himself has executed: but I cannot assent to that as a general proposition; for I remember a case of a trial at the bar of this court (a), where all the subscribing witnesses to Mr. Jolliffe's will were permitted to give evidence of the insanity of the testator at the time of making it. Now in that case they came to destroy the instrument which they had attested; and though their testimony was ultimately discredited, yet no doubt was entertained respecting their competency. I therefore entirely agree with the distinction taken by my brother Buller, that where a person has signed a negotiable instrument, he shall not be permitted to invalidate it by his testimony†. But that is not the case here. However, these are only the small points in the cause. And I again recur to that which is the principal ground of my opinion, namely,

* See on this *Forrester* v. *Pigou*, 3 Campb. 380; 1 M. & S. 9.

(a) *Lowe* v. *Jolliffe*, 1 Bl. Rep. 365.

† Sed vide *Jordaine* v. *Lashbrooke*, 7 T. R. 601.

that the witness was not interested in the cause then depending, neither could the verdict by any possibility be produced by him in any subsequent suit.

Ashhurst, J. There is so great a contradiction in decisions respecting the boundaries of evidence, that I rather choose to give my opinion on the particular circumstances of this case, than to lay down any general rule on the subject. The witness was called to prove that an under-writer on the same policy was not liable. Perhaps, in ordinary cases, one under-writer cannot be examined as a witness for or against another on the same policy: but the particular situation in which this witness stood makes a great difference; for he had acted as the broker, and could not by any act of his own deprive either party of his testimony by his afterwards signing the policy. From the nature of his situation he must be the best witness for many purposes; and if he knew of any previous secret circumstances which would invalidate the policy, he was committing a fraud on the rest of the under-writers. And if we were to reject the testimony of this witness, it would be open to this further objection, that the assured might collude with the broker, after he had obtained other subscriptions, and prevail on him to subscribe the same policy, in order to deprive the under-writers of the benefit of his evidence.

Buller, J.—This case involves in it the question which has been so repeatedly agitated in courts of law, What objections go to the *credit*, and what to the *competency*, of the witness? than which no question is more perplexed. I believe it was first held in *Ridout* v. *Johnson*, that one under-writer cannot be a witness for another; I have taken great pains (though without success) to get the real statement of that case, because it may perhaps have been determined on its own particular circumstances. However, in consequence of that determination, judges at *Nisi Prius* have frequently rejected under-writers as witnesses; nor is it extraordinary that at *Nisi Prius* they should have been guided by the only case upon the subject, without much examination into the grounds of it. But it is necessary now to decide the question in a more solemn manner. With regard to two of the objections which have been argued at the bar, they are not entitled to much consideration. The first of them is, that the witness was interested, because he was to con-

tribute to the costs: the release is a clear and decisive answer to that. The other is, that he was liable to pay the costs in the suit in equity; and the answer to that is, that he did everything which he could to discharge himself from that objection, by offering to dismiss his bill at his own costs. The case of *Goodtitle* v. *Welford* (*a*) shows, that if a person who is tendered as a witness does everything in his power to get rid of any objection to his testimony, it shall not be competent to the other party, by an obstinate refusal, to prevent his being examined. Then the remaining and principal question is, Whether this witness, having subscribed this policy as an under-writer, has thereby rendered himself altogether incompetent? because, if he were competent to answer *any* questions, he ought not to have been rejected *generally*. Then we must see whether, on this record, the fact to which he was required to speak might be such as he was competent to answer. On the principle of necessity alone I think this witness ought to have been received *. If the question intended to be put to him were as to any representation made by him to the under-writers at the time of subscribing, he must be admitted as a witness from necessity; for he was the only person who, from the nature of the thing, could speak to that transaction, and as such the under-writers had a right to call on him for his testimony. For it is scarcely possible that that which he alleged to the under-writers when they subscribed could be proved by any other person. Besides, it is admitted that if he had been called as an agent, he might have been examined: now *non constat* but that was the case here; and as he was rejected generally, the judgment must be reversed. On the general ground, whether one under-writer can be examined for another who has subscribed the same policy, I incline to think there is no objection to his competency. When the case of *Walton* v. *Shelly* was argued here, I looked into all the cases on the subject, and particularly into those on this head. The court, in that case, approved of what was laid down by Lord *Hardwicke* in *R.* v. *Bray*, that it was better to lean against objections to the competency, and to let them go to the credit of the witness. The true line I take to be this, *is the witness to gain or lose by the event of the cause?* Now this witness could not gain or lose by the event of this cause, because the verdict could

(*a*) Dougl. 134.

* See *Benjamin* v. *Porteus*, 2 H. Bl. 590; *Green* v. *New River Co.*, 4 T. R. 590; *Spencer* v. *Goulding*, Peake, 129; *Hunter* v. *Leathly*, 10 B. & C. 858; *Edmonds* v. *Lewe*, 8 B. & C. 408; *Mc Braine* v. *Fortune*, 3 Campb. 317.

not be evidence either for or against him in any other suit. This has been likened to cases where witnesses have been rejected on the ground, that they shall not be permitted to invalidate instruments which they themselves have signed: but the ground of that objection is, that it is holding out false credit to the world, and must be confined to negotiable instruments. If a person were permitted to set aside such an instrument, it would enable him to commit a fraud. But, for the reasons which I have stated, I think this witness ought to have been received; the consequence of which is, that the judgment must be reversed, and a *venire de novo* must issue returnable in this court.

Grose, J. With respect to the general question, Whether the witness's being interested in the *question* put to him shall render him incompetent, as well as his being interested *in the event of the suit*, I think it is better to narrow the objection to those cases where the witness is interested in the *event of the cause*. So much has already been said on this subject, that I am satisfied with declaring my assent to the rule, that unless the witness be interested in the event of the suit, he shall be admitted, except in those exceptions which have been established by solemn decisions. On the other ground, that a witness ought to be received from necessity, I think this falls within the case cited of a wager; and whatever may have been said in the case in Levinz, the case in Skinner is a clear authority to the general point. And that I find has been since adopted in another case of *George* v. *Pearce*, before *Gould*, J., who held that it was no objection to the competency of a witness, that he had laid a wager on the event of the cause: and that convinces me that Mr. J. *Gould* meant to follow the same rule which had been laid down by Lord *Holt* in the case in Skinner. So that the rule is, that a person in whose evidence another has gained an interest, shall not by his own act deprive the other of the benefit of his testimony. Now, in this case, the witness was the broker who effected the policy, and was the only person who could speak to many facts material to the cause. Therefore, on this as well as on the other ground, I think he ought to have been admitted. And if he were competent to answer any question, he ought not to have been rejected.

Judgment reversed, and a *venire de novo* awarded.

This is the leading case on that important subject—the incompetency of a witness on the ground of interest—important as the law now stands, for were reason and sound policy to be adopted as the lawgivers on this subject, interest would probably be held to be an objection fit to be addressed in every case to the *credit*, not to the *competency*.

As it is, the courts ever since *Bent* v. *Baker*, have evinced a laudable desire to let in truth wherever precedent will admit it, by holding objections to apply rather to the credit than the competency. *Bent* v. *Baker*, was followed by *Smith* v. *Prager*, 7 T. R. 60; and by the celebrated decision in *Jordaine* v. *Lashbrooke*, 7 T. R. 601, which is remarkable because, while it recognised the general principles laid down in *Bent* v. *Baker*, it afforded Lord *Kenyon* an opportunity of correcting the report of that case, as to certain expressions there attributed to him; that was an action against the defendants, as acceptors of the following bill of exchange:—

"*Hamburgh, 30th December, 1796, for* 100*l*. *At three usances, pay this my first Bill of Exchange, to the Order of Messrs. J. Thynne and Co.,* 100*l*. *sterling value in account, and place it to account of G. W., as advised by David Heur Meyer.*

"*To Messrs. T. Lashbrooke and Sons, London.*"

Accepted by the defendants, and indorsed by Messrs. Thynne and Co. the payees.

At the trial, Thynne was called by the defendants to prove, that although dated *Hamburgh*, the bill was drawn in London, so that it was not receivable in evidence for want of a stamp. The witness was objected to on the ground of incompetency, but received by the L. C. J. *Kenyon*, and a rule for a new trial on that ground discharged. "The proposition," said Lord *Kenyon*, "attempted to be established for the plaintiffs is, that for some technical reason, or for some reason of policy, a court of justice must shut its ears, and not suffer facts to be laid before them by a witness who is not infamous in character, and who who has no interest in the cause. If the law be so, there is some novelty in it. I have always understood the law to be that where a witness is infamous, and his record of conviction is produced, or where he is interested in the event of the cause, he cannot be received; but to carry the rule beyond that, would be extending it further than policy, morality, or the interest of the subject require. The rule contended for by the plaintiff is this, that 'however infamously you the defendant may have been used, whatever may be the rights of other persons, if I, the plaintiff, the party to the fraud, can get on the instrument the name of the person who may be the only witness to the transaction, I will stand entrenched within the forms of law, and impose silence on that only witness, though he be a person of unimpeachable character, and not interested in the cause.' But I cannot conceive on what ground such a proposition can be established. It is contradicted by every hour's experience. It would tend to shew, that a party to an instrument shall not be permitted to contest its validity in a court of law, not only by his own evidence, but by any evidence whatever. But in actions brought on bills of exchange and notes of hand, it is permitted to the defendant to shew that the bill, or note, was given on an usurious or gaming consideration; that is proved by every day's experience: then the general proposition is not true. But does the policy of allowing such a defence to be made apply to this case as strongly as to those? Precisely the same. And not finding any case prior to *Walton* v. *Shelley*, 1 T. R. 296, in which such a defence was excluded, I cannot bring my mind to assent to the authority of that case. This is one of the most important questions that can be discussed. On the rules of evidence depend the facts of every question that can be discussed, and, therefore, it is of the utmost importance to preserve those rules. It has been argued, that the defendant is estopped in this case; but estoppels are odious, and ought not to be extended further than the law has already carried them. The word estoppel does not apply to such a case as the present. When the drawee accepts a bill, he admits it to have been signed by the person by whom it professes to have been made; but he does not thereby admit that the holder of the bill is in a condition to

enforce payment of it. Most of the cases cited I admit to be law. *That of Bent* v. *Baker, is of great authority. It came here on a writ of error from the Common Pleas; and though a writ of error was afterwards brought to reverse our judgment, it was at length abandoned.* But I wish to correct an expression imputed to me in the report of that case, '*that where a person has signed a negotiable instrument, he shall not be permitted to invalidate it by his testimony.*' Because having frequently weighed this subject in my mind, and having not only entertained a contrary opinion, but having also always acted on that opinion at *nisi prius*, I think I never could have used the expression imputed to me. The case of testamentary witnesses cannot, in my opinion, be distinguished from the present; and if not, there is abundant authority in support of my opinion. Sir *J. Jekyll* always permitted the subscribing witnesses to a will to give evidence to impeach the will, and the same thing was also done in *Lowe* v. *Joliffe*, 1 Bl. 365."

Having thus got rid of the exception to the general rule, which would *primâ facie* appear to have been recognised in *Bent* v. *Baker;* and having shewn that a person who has signed an instrument, has not *necessarily* such an interest as will prevent him from being examined for the purpose of impeaching its validity, let us proceed to the main doctrine established in that case, *viz.*, that *a witness who has no interest in the event of the cause shall not be rejected as incompetent.*

The strongest probability of bias, if it do not amount to an actual *interest*, will not disqualify. If two persons are indicted for perjury, for swearing to the same fact, it is highly probable, indeed morally certain, that each will desire the acquittal of the other. Yet they are competent witnesses for one another. *Bath* v. *Montague*, Fort. 247; 2 Holt, N. P. C. 280; *Rex* v. *Gray*, S. N. P. 8th ed. 1177, citing 2 Rolle's Ab. 685; pl. 3 & 2 Hale's P. C. 280. So where a woman was produced as a witness against a prisoner whose conviction she expected would obtain her husband a pardon, her wishes must have been been strongly on the side on which she was called, but she was nevertheless held to be competent. *Rudd's case*, 1 Leach, 151. So too a witness has been held competent who believed himself under an obligation in honour to indemnify the party for whom he was called. *Pederson* v. *Stoffles*, 1 Campb. 145. It has been doubted whether a witness who believes himself *legally* interested, although not so in fact, be not incompetent, *Trelawney* v. *Thomas*, 1 H. Bl. 307; and Ph. on Ev. 7th ed. 54; but it is difficult to assign any ground for such a distinction. In short, to disqualify a witness, there must be not merely hope, not merely expectation, but an *interest* in the event of the suit, and that interest must be *direct*. If it be remote, merely *possible*, it will not disqualify. *Collins* v. *Gwynne*, 9 Bingh. 559; *Nowell* v. *Davies*, 5 B. & Ad. 368; *Carter* v. *Pearce*, 1 T. R. 163; or if it be compensated by an equal interest on the other side. *Ilderton* v. *Atkinson*, 7 T. R. 480; *Shuttleworth* v. *Stephens*, 1 Campb. 408; *York* v. *Blott*, 5 M. & S. 71.

It is not intended in this note to collect the numerous cases in which the question discussed has been that of competency and incompetency on the ground of interest. They will be found diligently collected and ably commented upon in the well-known treatises of Mr. Phillips and Mr. Starkie. The cases in which witnesses have been disqualified by *interest*, may perhaps be divided into two classes, viz.:

1. Cases in which the verdict may be used in evidence for or against the witness.

2. Cases in which it will have an immediate operation on his interests otherwise than by becoming evidence for or against him.

Under the former head may be placed the cases of a servant, or agent, who are not competent, in an action by a third person against their principal, to disprove their own negligence, by which the injury, which is the subject of the action, is stated to have been occasioned. *Green* v. *New Riv. Co.*, 4 T. R. 589; *Martin* v. *Henricksen*, 2 L. Raym. 1007; *Miller* v. *Falconer*, 1 Campb. 251, 15 East. 474; *Rotheroe* v. *Elton*, Peake 84; *Gevers* v. *Mainwaring*, Holt, 139. The *interest* of the witness in these cases consists in the circumstance, that in an action brought by his employer

against him, the verdict in the suit in which he is a witness, will be good evidence of the amount of damage occasioned by his negligence. So in the case put by Lord *Kenyon* in the text, where a right of common is claimed by custom, one who claims under the same custom cannot be a witness to support the right, because the verdict might be evidence in his own favour. See too *Anscomb* v. *Shore*, 1 Taunt. 261; *Rhodes* v. *Ainsworth*, 1 B. & A. 87; *Company of Carpenters* v. *Hayward*, 1 Dougl. 373.

But there are other cases in which the witness has a direct interest in the event of the suit other than that occasioned by the verdict being evidence for or against him; thus a witness was not permitted to prove, in an action of ejectment, that he was the real tenant in possession, for the purpose of defeating the plaintiff; since, though the verdict might not be evidence against him, the judgment and execution would turn him out of possession immediately. *Doe* v. *Wilde*, 3 Taunt. 183. So, the residuary legatee would not be a good witness for the executor, for the plaintiff's recovery would diminish his residue. *Baker* v. *Tyrwhitt*, 4 Campb. 27. So, the remainderman in fee is not a good witness in an ejectment brought by the tenant in tail to avoid a recovery, for his remainder will vest, if the tenant in tail should recover. *Doe d. Lord Teynham* v. *Tyler*, 6 Bingh. 394. So, a witness is incompetent who has a power of attorney to receive the sum recovered, and intends to pay himself thereout a debt due to him from the plaintiff. *Powell* v. *Gordon*, 2 Esp. 735.

In some of these cases the competency of the witness might have been restored by a release from the party calling him, or from himself; thus the agent might be rendered competent by a release from his principal. So too a bankrupt, who is, generally speaking, not a competent witness to increase the estate on account of his interest in the allowance and surplus, see *Butler* v. *Cooke*, Cowp. 70; B. N. P. 43; might render himself competent by releasing his assignees. *Nares* v. *Saxby*, 2 T. R. 497; *Carlisle* v. *Eady*, 1 C. & P. 234; B. N. P. 43. In short, whenever there was any person whose release would destroy the interest by which alone the witness was incapacitated, a release from that person, by destroying his interest, restored his competency. It was partly to dispense with the trouble of executing a formal deed in such cases, partly to obviate the danger that no release might be in readiness, that St. 3 & 4 W. 4, c. 42, ss. 26, 27, enacted, "That if any witness shall be objected to as incompetent, on the ground that the verdict, or judgment, in the action in which it shall be proposed to examine him, would be admissible in evidence for or against him, such witness shall nevertheless be examined; but in that case, a verdict, or judgment, in that action, in favour of the party on whose behalf he shall have been examined, shall not be admissible in evidence for him, or any one claiming under him; nor shall a verdict, or judgment, against the party on whose behalf he shall have been examined, be admissible in evidence against him or any one claiming under him."

"Sec. 27. And be it further enacted, that the name of every witness objected to as incompetent, on the ground that such verdict, or judgment, would be admissible in evidence for or against him, shall, at the trial, be indorsed on the record, or document, on which the trial shall be had, together with the name of the party on whose behalf he was examined, by some officer of the court, at the request of either party, and shall be afterwards entered on the record of the judgment; and such indorsement, or entry, shall be sufficient evidence that such witness was examined, in any subsequent proceeding in which the verdict, or judgment, shall be offered in evidence."

A good many decisions took place at *Nisi Prius* on this statute, shortly after its enactment; the facts of which it would be useless to state at length, since they cannot be reconciled, and consequently left the interpretation of the act *in dubio*. See *Burgess* v. *Cuthell*, 1 M. & Rob. 315, and 6 C. & P. 282; *Mitchell* v. *Hunt*, 6 C. & P. 351; *Harrington* v. *Caswall*, ibid.; *Pickles* v. *Hollings*, 1 M. & Rob. 468; *Creevy* v. *Bowman*, 1 M. & Rob. 496; *Hodson* v. *Marshall*, 7 C. & P. 16; *Harding* v. *Cobley*, 6 C. & P. 664. At last, in

Yeomans v. *Legh*, 2 M. & Wels. 419, the construction of the statute came before the Court of Exchequer, on a motion for a new trial, on the ground that a witness had been improperly rejected on the ground of incompetency. The witness was a servant who drove his master's carriage, for the negligent driving of which the action was brought. It was contended, that the act did not apply to such cases as that under discussion, in which a release would operate to produce competency. The court held, that the witness was rendered competent by the statute. "The effect of the clause," said *Parke*, B., "is to make the witness competent, when the only interest is, that the verdict may be used for or against the witness. In this case there is no interest, except that the verdict might be used against him in an action by his master, to shew the amount of the damages recovered. I am clearly of opinion, that the effect of the act is to take away the objection to the admissibility of the witness in cases of this sort." And *Alderson*, B., said, "He had always understood the effect of the act to be, to supersede the necessity and save the expense of a *release*."

We must not, however, be too hasty in concluding that this act will make the witness competent, wherever a release would formerly have rendered him so. In the instance of a servant called to disprove his own negligence; if he in fact *was* guilty of the negligence, he is liable to an action independently of the verdict for the breach of duty to his master which he has committed. The verdict indeed ascertains what the damages in that action ought to be, and will be evidence against him for that purpose; but it does not give his master any new ground of suit against him. But there are other cases in which the witness's incompetency has been heretofore removed by a release, in which the effect of the verdict would have been to give a new right of action against the witness, which, without the verdict, could not have existed. Such is the case in which an accommodation-acceptor calls the person for whose accommodation he accepted; the verdict in that case will not merely be evidence against the witness, but it will create a new cause of action against him, which did not before exist; for it will give the *acceptor* a right to sue him for indemnity. In such a case, the witness is not disqualified merely because the verdict "would be admissible in evidence against him," but because the verdict creates, and is, a new substantive ground of action against him. Still, since the verdict would be the only evidence of the creation of that new cause of action; and, since to render it inadmissible as evidence against the witness, would, in fact, be to prohibit such action being brought, the courts would now probably hold, notwithstanding *Burgess* v. *Cuthill*, 6 C. & P. 282, 1 M. & Rob. 315, that the statute applies to such cases also. In the case of *Bowman* v. *Willis*, 3 Bingh. N. C. 669, the effect of the statute was considered in the Common Pleas. In that case the defendant, who was the legatee of W.'s horses, had sold several of them, and among others, one for which he received 10*l.*, and which the plaintiff asserted was never the property of W., but had been lent by him, the plaintiff, to W. on trial, and had not been approved or paid for. In order to prove this case, he called the residuary legatee of W., who was objected to upon the ground, that if the plaintiff failed in this action, he would bring an action for the price of the horse, which had not yet been paid, and then that price must be paid out of the residue of W.'s estate, and would thus come out of the pocket of the witness. But the court held, that he was competent, and the L. *C. J.*, said, "There is no immediate benefit resulting to the witness, from the termination of the suit one way or the other. It is only on the supposition that a subsequent action may be brought for the price, and that his defence would be the recovery in this action, that his interest arises. It seems to me to be precisely the case contemplated by the late statute, which renders a witness competent, notwithstanding the effect of the verdict and judgment."

It is however apprehended, that, in such cases as those belonging to the second of the two classes above specified at page 51, namely, in which the interest of the witness

does not at all arise out of the use of the verdict in evidence, but out of the consequences which will result from it, independently of its effect as evidence in the suit, the statute would not be held to apply. "There may," said the L. *C. J.*, in *Bowman* v. *Willis*, be cases in which a witness may have a direct interest, independently of the effect of the verdict in the cause. Thus, a tenant cannot be called in ejectment for the purpose of establishing his lessor's title, because he has a direct interest to secure his own possession under the lease." The cases above put of the remainder-man, the residuary legatee called as a witness for the executor, and the witness who had a power to receive the amount of the damages for his own use, seem liable to the same observation.

PASLEY *v.* FREEMAN.

TRINITY, 29 *G.* 3.—*K. B.*

[REPORTED 3 T. R. 51.]

A false affirmation, made by the defendant with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action upon the case in the nature of deceit. In such an action, it is not necessary that the defendant should be benefited by the deceit, or that he should collude with the person who is.

THIS was an action in the nature of a writ of deceit; to which the defendant pleaded the general issue. And after a verdict for the plaintiffs on the third count, a motion was made in arrest of judgment.

The third count was as follows: "And whereas also the said Joseph Freeman, afterwards, to wit, on the 21st day of February in the year of our Lord 1787, at London aforesaid, in the parish and ward aforesaid, further intending to deceive and defraud the said John Pasley and Edward, did wrongfully and deceitfully encourage and persuade the said John Pasley and Edward, to sell and deliver to the said John Christopher Falch divers other goods, wares, and merchandises, to wit, sixteen other bags of cochineal of great value, to wit, of the value of 2634*l.* 16*s.* 1*d.* upon trust and credit; and did for that purpose then and there falsely, deceitfully, and fraudulently, assert and affirm to the said John Pasley and Edward, that the said John Christopher then and there was a person safely to be trusted and given credit to in that respect; and did thereby falsely, fraudulently, and deceitfully, cause and procure the said John Pasley and Edward to sell and deliver the said last-mentioned goods, wares, and merchandises, upon trust and credit, to the said John Christopher; and in fact they the

said John Pasley and Edward, confiding in and giving credit to the said last-mentioned assertion and affirmation of the said Joseph, and believing the same to be true, and not knowing the contrary thereof, did afterwards, to wit, on the 28th day of February in the year of our Lord 1787, at London aforesaid, in the parish and ward aforesaid, sell and deliver the said last-mentioned goods, wares, and merchandises, upon trust and credit to the said John Christopher; whereas in truth and in fact, at the time of the said Joseph's making his said last-mentioned assertion and affirmation, the said John Christopher was not then and there a person safely to be trusted and given credit to in that respect, and the said Joseph well knew the same, to wit, at London aforesaid, in the parish and ward aforesaid. And the said John Pasley and Edward further say, that the said John Christopher hath not, nor hath any other person on his behalf, paid to the said John Pasley and Edward, or either of them, the said sum of 2634*l.* 16*s.* 1*d.* last mentioned, or any part thereof, for the said last-mentioned goods, wares, and merchandises; but on the contrary the said John Christopher then was, and still is, wholly unable to pay the said sum of money last mentioned, or any part thereof, to the said John Pasley and Edward, to wit, at London aforesaid, in the parish and ward aforesaid; and the said John Pasley and Edward aver that the said Joseph falsely and fraudulently deceived them in this, that at the time of his making his said last-mentioned assertion and affirmation, the said John Christopher was not a person safely to be trusted or given credit to in that respect as aforesaid, and the said Joseph then well knew the same, to wit, at London aforesaid, in the parish and ward aforesaid; by reason of which said last-mentioned false, fraudulent, and deceitful assertion and affirmation of the said Joseph, the said John Pasley and Edward have been deceived and imposed upon, and have wholly lost the said last-mentioned goods, wares, and merchandises, and the value thereof, to wit, at London aforesaid, in the parish and ward aforesaid; to the damage," &c.

Application was first made for a new trial, which, after argument, was refused: and then this motion in arrest of judgment. Wood argued for the plaintiffs, and Russell for the defendant, in the last term: but as the court went so

fully into this subject in giving their opinions, it is unnecessary to give the arguments at the bar.

The court took time to consider of this matter, and now delivered their opinions *seriatim*.

Grose, J. Upon the face of this count in the declaration, no privity of contract is stated between the parties. No consideration arises to the defendant; and he is in no situation in which the law considers him in any trust, or in which it demands from him any account of the credit of Falch. He appears not to be interested in any transaction between the plaintiffs and Falch, nor to have colluded with them; but he knowingly asserted a falsehood by saying that Falch might be safely entrusted with the goods, and given credit to, for the purpose of inducing the plaintiffs to trust him with them, by which the plaintiffs lost the value of the goods. Then this is an action against the defendant for making a false affirmation, or telling a lie, respecting the credit of a third person, with intent to deceive, by which the third person was damnified; and for the damages suffered, the plaintiffs contend that the defendant is answerable in an action upon the case. It is admitted, that the action is new in point of precedent: but it is insisted that the law recognises principles on which it may be supported. The principle on which it is contended to lie is, that wherever deceit or falsehood is practised to the detriment of another, the law will give redress. This proposition I controvert; and shall endeavour to show, that in *every* case where deceit or falsehood is practised to the detriment of another, the law will not give redress; and I say that by the law, as it now stands, no action lies against any person standing in the predicament of this defendant for the false affirmation stated in the declaration. If the action can be supported, it must be upon the ground, that there exists in this case, what the law deems *damnum cum injuriâ*. If it does, I admit that the action lies; and I admit that, upon the verdict found, the plaintiffs appear to have been damnified. But whether there has been *injuria*, a wrong, a tort, for which an action lies, is matter of law. The *tort* complained of is the false affirmation made with intent to deceive; and it is said to be an action upon the case analogous to the old writ of deceit. When this was first argued at the bar, on the motion for a new trial, I confess I thought

it reasonable that the action should lie: but, on looking into the old books for cases in which the old action of deceit has been maintained upon the false affirmation of the defendant, I have changed my opinion. The cases on this head are brought together in Bro. tit. *Deceit*, pl. 29, and in Fitz. Abr. I have likewise looked into Danvers, Kitchins, and Comyns, and I have not met with any case of an action upon a false affirmation, except against a *party to a contract*, and where there is a *promise*, either express or implied, that the fact is true, which is misrepresented: and no other case has been cited at the bar. Then if no such case has ever existed, it furnishes a strong objection against the action, which is brought, for the first time, for a supposed injury which has been daily committed for centuries past; for I believe there has been no time when men have not been constantly damnified by the fraudulent misrepresentations of others: and if such an action would have lain, there certainly has been, and will be, a plentiful source of litigation, of which the public are not hitherto aware. A variety of cases may be put: suppose a man recommends an estate to another, as knowing it to be of greater value than it is; when the purchaser has bought it, he discovers the defect, and sells the estate for less than he gave; why may not an action be brought for the loss, upon any principle that will support this action? And yet such an action has never been attempted. Or, suppose a person present at the sale of a horse asserts that he was his horse, and that he knows him to be sound and sure-footed, when in fact the horse is neither the one or the other; according to the principle contended for by the plaintiffs, an action lies against the person present as well as the seller; and the purchaser has two securities. And even in this very case, if the action lies, the plaintiffs will stand in a peculiarly fortunate predicament, for they will then have the responsibility both of Falch and the defendant. And they will be in a better situation than they would have been, if, in the conversation that passed between them and the defendant, instead of asserting that Falch might safely be trusted, the defendant had said, "If he do not pay for the goods, I will;" for then undoubtedly an action would not have lain against the defendant. Other and stronger cases may be put of actions that must necessarily spring out

of any principle upon which this can be supported, and yet which were never thought of till the present action was brought. Upon what principle is this act said to be an injury? The plaintiffs say, on the ground that, when the question was asked, the defendant was bound to tell the truth. There are cases, I admit, where a man is bound not to misrepresent, but to tell the truth; but no such case has been cited, except in the case of *contracts;* and all the cases of deceit for misinformation may, it seems to me, be turned into actions of *assumpsit*. And so far from a person being bound, in a case like the present, to tell the truth, the books supply me with a variety of cases in which even the contracting party is not liable for a misrepresentation. There are cases of two sorts, in which, though a man is deceived, he can maintain no action. The first class of cases (though not analogous to the present) is, where the affirmation is that the thing sold has not a defect which is a visible one: there the imposition, the fraudulent intent, is admitted, but it is no *tort*.* The second head of cases is, where the affirmation is (what is called in some of the books) a nude assertion; such as the party deceived may exercise his own judgment upon; as where it is matter of opinion, where he may make inquiries into the truth of the assertion, and it becomes his own fault from laches that he is deceived. 1 Ro. Abr. 101; Yelv. 20; 1 Sid. 146; Cro. Jac. 386; *Bayley* v. *Merrel*. In *Harvey* v. *Young*, Yelv. 20, J. S., who had a term for years, affirmed to J. D. that the term was worth 150*l*. to be sold, upon which J. D. gave 150*l*., and afterwards could not get more than 100*l*. for it, and then brought his action; and it was alleged that this matter did not prove any fraud, for it was only a naked assertion that the term was worth so much, and it was the plaintiff's folly to give credit to such assertion. *But if the defendant had warranted* the term to be of such a value to be sold, and upon that the plaintiff had bought it, it would have been otherwise; for the warranty given by the defendant is a matter to induce confidence and trust in the plaintiff. This case, and the passage in 1 Ro. Abr. 101, are recognised in 1 Sid. 146. How, then, are the cases? None exist, in which such an action as the present has been brought: none, in which any principle applicable to the present case has been laid down to prove that it will lie—not even a *dictum*.

(*) See *Margetson* v. *Wright*, 7 Bingh. 605; 8 Bingh. 457; 3 Bl. Comm. 166; *Dyer* v. *Hargrave*, 10 Ves. 507.

But from the cases cited, some principles may be extracted to show that it cannot be sustained: 1st, That what is fraud, which will support an action, is matter of law; 2dly, That in *every* case of a fraudulent misrepresentation attended with damage, an action will not lie, *even between contracting parties*; 3dly, That if the assertion be a nude assertion, it is that sort of misrepresentation, the truth of which does not lie merely in the knowledge of the defendant, but may be inquired into, and the plaintiff is bound so to do; and he cannot recover a damage which he has suffered by his laches. Then let us consider how far the facts of the case come within the last of these principles. The misrepresentation stated in the declaration is respecting the credit of Falch; the defendant asserted that the plaintiffs might safely give him credit: but credit to which a man is entitled is matter of judgment and opinion, on which different men might form different opinions, and upon which the plaintiffs might form their own: to mislead which no fact to prove the good credit of Falch is falsely asserted. It seems to me, therefore, that any assertion relative to credit, especially where the party making it has no interest, nor is in any collusion with the person respecting whose credit the assertion is made, is like the case in Yelverton respecting the value of the term. But at any rate it is not an assertion of a fact peculiarly in the knowledge of the defendant. Whether Falch deserved credit depended on the opinion of many; for credit exists on the good opinion of many. Respecting this, the plaintiffs might have inquired of others, who knew as much as the defendant; it was their fault that they did not, and they have suffered damage by their own laches. It was owing to their own gross negligence that they gave credence to the assertion of the defendant, without taking pains to satisfy themselves that that assertion was founded in fact, as in the case of *Bayly* v. *Merrel*. I am therefore of opinion, that this action is as novel in principle as it is in precedent, that it is against the principles to be collected from analogous cases, and consequently that it cannot be maintained.

Buller, J. The foundation of this action is fraud and deceit in the defendant, and damage to the plaintiffs. And the question is, Whether an action thus founded can be sustained in a court of law. Fraud without damage, or

damage without fraud, gives no cause of action, but where these two concur, an action lies. *Per Croke*, J., 3 Bulst. 95. But it is contended, that this was a bare naked lie; that, as no collusion with Falch is charged, it does not amount to a fraud: and, if there were any fraud, the nature of it is not stated. And it was supposed by the counsel who originally made the motion, that no action could be maintained, unless the defendant, who made this false assertion, had an interest in so doing. I agree that an action cannot be supported for telling a bare naked lie; but that I define to be, saying a thing which is false, knowing or not knowing it to be so, and without any design to injure, cheat, or deceive, another person. Every deceit comprehends a lie; but a deceit is more than a lie on account of the view with which it is practised, its being coupled with some dealing, and the injury which it is calculated to occasion, and does occasion, to another person. Deceit is a very extensive head in the law; and it will be proper to take a short view of some of the cases which have existed on the subject, to see how far the courts have gone, and what are the principles upon which they have decided. I lay out of the question the case in 2 Cro. 196, and all other cases which relate to freehold interests in lands; for they go on the special reason that the seller cannot have them without title, and the buyer is at his peril to see it. But the cases cited on the part of the defendant, deserving notice, are, Yelv. 20; Carth. 90; Salk. 210. The first of these has been fully stated by my brother Grose: but it is to be observed that the book does not affect to give the reasons on which the court delivered their judgment: but it is a case quoted by counsel at the bar, who mentions what was alleged by counsel in the other case. If the court went on a distinction between the words *warranty* and *affirmation*, the case is not law: for it was rightly held by *Holt*, C. J., in the subsequent cases, and has been uniformly adopted ever since, that an affirmation at the time of a sale is a warranty, provided it appear on evidence to have been so intended.* But the true ground of that determination was, that the assertion was of mere matter of judgment and opinion; of a matter of which the defendant had no particular knowledge, but of which many men will be of many minds, and which is often governed by whim and caprice. Judgment or opinion, in such case, im-

(*) See *Power* v. *Barham*, 4 Ad. & Ell. 473, and *ante*, p. 17, *in notâ*.

plies no knowledge. And here this case differs materially from that in Yelverton: my brother Grose considers this assertion as mere matter of opinion only; but I differ from him in that respect; for it is stated on this record, that the defendant knew that the fact was false. The case in Yelv. admits, that if there had been fraud, it would have been otherwise. The case of *Crosse* v. *Gardner*, Carth. 90, was upon an affirmation that oxen, which the defendant had in his possession, and sold to the plaintiff, were his, when in truth they belonged to another person. The objection against the action was, that the declaration neither stated that the defendant *deceitfully* sold them, or that he *knew* them to be the property of another person; and a man may be mistaken in his property and right to a thing *without any fraud or ill intent*. *Ex concessis*, therefore, if there were fraud or deceit, the action would lie; and knowledge of the falsehood of the thing asserted is fraud and deceit. But notwithstanding these objections, the court held that the action lay, because the plaintiff had no means of knowing to whom the property belonged but only by the possession. And in Cro. Jac. 474, it was held, that affirming them to be his, knowing them to be a stranger's, is the offence, and cause of action. The case of *Medina* v. *Stoughton* (*a*), in the point of decision, is the same as *Crosse* v. *Gardner:* but there is an *obiter dictum* of *Holt*, C. J., that where the seller of a personal thing is out of possession, it is otherwise, for there may be room to question the seller's title, and *caveat emptor* in such case to have an express warranty or a good title. This distinction by *Holt* is not mentioned by Lord *Raym.* 593, who reports the same case: and if an affirmation at the time of sale be a warranty, I cannot feel a distinction between the vendor's being in or out of possession. The thing is bought of him and in consequence of his assertion: and if there be any difference, it seems to me that the case is strongest against the vendor when he is out of possession, because then the vendee has nothing but the warranty to rely on. These cases then are so far from being authorities against the present action, that they show that, if there be fraud or deceit, the action will lie; and that knowledge of the falsehood of the thing asserted is fraud and deceit. Collusion then is not necessary to constitute fraud. In the case of a conspiracy, there must be a collusion between two

(*a*) Salk. 210.

or more to support an indictment: but if one man alone be guilty of an offence, which, if practised by two, would be the subject of an indictment for a conspiracy, he is civilly liable in an action for reparation of damages at the suit of the person injured. That knowledge of the falsehood of the thing asserted constitutes fraud though there be no collusion, is further proved by the case of *Risney* v. *Selby*, Salk. 211, where, upon a treaty for the purchase of a house, the defendant fraudulently affirmed that the rent was 30*l. per annum*, when it was only 20*l. per annum*, and the plaintiff had his judgment; for the value of the rent is a matter which lies in the private knowledge of the landlord and tenant, and if they affirm the rent to be more than it is, the purchaser is cheated, and ought to have a remedy for it. No collusion was there stated, nor does it appear that the tenant was ever asked a question about the rent, and yet the purchaser might have applied to him for information; but the judgment proceeded wholly upon the ground that the defendant knew that what he asserted was false. And by the words of the book it seems that, if the tenant had said the same thing, he also would have been liable to an action. If so, that would be an answer to the objection, that the defendant in this case had no interest in the assertion which he made. But I shall not leave this point on the *dictum* or inference which may be collected from that case. If A. by fraud and deceit cheat B. out of 1000*l.*, it makes no difference to B. whether A., or any other person, pockets that 1000*l.* He has lost his money, and if he can fix fraud upon A., reason seems to say that he has a right to seek satisfaction against him. Authorities are not wanting on this point. 1 Roll. Abr. 91, pl. 7. If the vendor affirm that the goods are the goods of a stranger his friend, and that he had authority from him to sell them, and upon that B. buy them, when in truth they are the goods of another, yet if he sell them fraudulently and falsely on this pretence of authority, though he do not warrant them, and though it be not averred that he sold them knowing them to be the goods of the stranger, yet B. shall have an action for this deceit. It is not clear from this case, whether the fraud consisted in having no authority from his friend, or in knowing that the goods belonged to another person: what is said at the end of the case only proves that

falsely and *fraudulently* are equivalent to *knowingly*. If the first were the fact in the case—namely, that he had no authority—the case does not apply to this point; but if he had an authority from his friend, whatever the goods were sold for, his friend was entitled to, and he had no interest in them. But, however that might be, the next case admits of no doubt. For in 1 Ro. Abr. 100, pl. 1, it was held, that if a man acknowledge a fine in my name, or acknowledge a judgment in an action in my name, of my land, this shall bind me for ever; and therefore I may have a writ of deceit against him who acknowledged it. So if a man acknowledge a recognizance, statute-merchant, or staple, there is no foundation for supposing that in that case the person acknowledging the fine or judgment was the same person to whom it was so acknowledged. If that had been necessary, it would have been so stated; but if it were not so, he who acknowledged the fine had no interest in it. Again, in 1 Ro. Abr. 95, l. 25, it is said, if my servant lease my land to another for years, reserving a rent to me, and to persuade the lessee to accept it, he promise that he shall enjoy the land without incumbrances; if the land be incumbered, &c. the lessee may have an action on the case against my servant, because he made an express warranty. Here then is a case in which the party had no interest whatever. The same case is reported in Cro. Jac. 425, but no notice is taken of this point; probably because the reporter thought it immaterial whether the warranty be by the master or servant. And if the warranty be made at the time of the sale, or before the sale, and the sale is upon the faith of the warranty, I can see no distinction between the cases. The gist of the action is fraud and deceit, and if that fraud and deceit can be fixed by evidence on one who had no interest in his iniquity, it proves his malice to be the greater. But it was objected to this declaration, that if there were any fraud, the nature of it is not stated: to this the declaration itself is so direct an answer, that the case admits of no other. The fraud is, that the defendant procured the plaintiffs to sell goods on credit to one whom they would not otherwise have trusted, by asserting that which he knew to be false. Here then is the fraud, and the means by which it was committed; and it was done with a view to enrich Falch by impoverishing the plaintiffs,

or, in other words, by cheating the plaintiffs out of their goods. The cases which I have stated, and Sid. 146, and 1 Keb. 522, prove that the declaration states more than is necessary; for *fraudulenter* without *sciens*, or *sciens* without *fraudulenter*, would be sufficient to support the action. But, as Mr. J. *Twisden* said in that case, the fraud must be proved. The assertion alone will not maintain the action; but the plaintiff must go on to prove that it was false, and that the defendant knew it to be so: by what means that proof is to be made out in evidence need not be stated in the declaration. Some general arguments were urged at the bar, to shew that mischiefs and inconveniences would arise if this action were sustained: for if a man, who is asked a question respecting another's responsibility, hesitate, or is silent, he blasts the character of the tradesman; and if he say that he is insolvent, he may not be able to prove it. But let us see what is contended for: it is nothing less than that a man may assert that which he knows to be false, and thereby do an everlasting injury to his neighbour, and yet not be answerable for it. This is as repugnant to law as it is to morality. Then it is said, that the plaintiffs had no right to ask the question of the defendant. But I do not agree in that; for the plaintiffs had an interest in knowing what the credit of Falch was. It was not the inquiry of idle curiosity, but it was to govern a very extensive concern. The defendant undoubtedly had his option to give an answer to the question, or not; but if he gave none, or said he did not know, it is impossible for any court of justice to adopt the possible inferences of a suspicious mind as a ground for grave judgment. All that is required of a person in the defendant's situation is, that he shall give no answer, or that if he do, he shall answer according to the truth as far as he knows. The reasoning in the case of *Coggs* v. *Barnard*, which was cited by the plaintiff's counsel, is, I think, very applicable to this part of the case. If the answer import insolvency, it is not necessary that the defendant should be able to prove that insolvency to a jury; for the law protects a man in giving that answer, if he does it in confidence and without malice. No action can be maintained against him for giving such an answer, unless express malice can be proved. From the circumstance of the law giving that protection, it seems to

follow, as a necessary consequence, that the law not only gives sanction to the question, but requires that, if it be answered at all, it shall be answered honestly. There is a case in the books, which, though not much to be relied on, yet serves to shew that this kind of conduct has never been thought innocent in Westminster Hall. In *R.* v. *Gunston*, 1 Str. 583, the defendant was indicted for pretending that a person of no reputation was Sir J. Thornycraft, whereby the prosecutor was induced to trust him; and the court refused to grant a *certiorari*, unless a special ground were laid for it. If the assertion in that case had been wholly innocent, the court would not have hesitated a moment. How indeed an indictment could be maintained for that, I do not well understand; nor have I learnt what became of it. The objection to the indictment is, that it was merely a private injury; but that is no answer to an action. And if a man will wickedly assert that which he knows to be false, and thereby draws his neighbour into a heavy loss, even though it be under the specious pretence of serving his friend, I say *ausis talibus istis non jura subserviunt.*

Ashhurst, J. The objection in this case, which is to the third count in the declaration, is, that it contains only *a bare assertion*, and does not state that the defendant had any *interest*, or that he *colluded* with the other party who had. But I am of opinion that the action lies, notwithstanding this objection. It seems to me that the rule laid down by *Croke*, J., in *Baily* v. *Merrell* (*a*), is a sound and solid principle—namely, that fraud without damage, or damage without fraud, will not found an action; but where both concur, an action will lie. The principle is not denied by the other judges, but only the application of it, because the party injured there, who was the carrier, had the means of attaining *certain knowledge* in his own power—namely, by weighing the goods; and therefore it was a foolish credulity against which the law will not relieve. But that is not the case here, for it is expressly charged that the defendant *knew* the falsity of the allegation, and which the jury have found to be true; but *non constat* that the plaintiffs knew it, or had any means of knowing it, but trusted to the veracity of the defendant. And many reasons may occur why the defendant might know that fact better than the plaintiffs; as if there had before this event subsisted a partnership

(*a*) 3 Bulst. 95.

between him and Falch, which had been dissolved: but at any rate it is stated as a fact that he knew it. It is admitted that a fraudulent affirmation, when the party making it has an interest, is a ground of action; as in *Risney* v. *Selby* (*a*), which was a false affirmation made to a purchaser as to the rent of a farm which the defendant was in treaty to sell to him. But it was argued that the action lies not, unless where the party making it has an interest, or colludes with one who has. I do not recollect that any case was cited which proves such a position; but if there were any such to be found, I should not hesitate to say that it could not be law; for I have so great a veneration for the law as to suppose that nothing can be law which is not founded in common sense or common honesty. For the gist of the action is *the injury done to the plaintiff*, and not whether the defendant meant to be a gainer by it: what is it to the plaintiff whether the defendant was or was not to gain by it? the injury to him is the same. And it should seem that it ought more emphatically to lie against him, as the malice is more diabolical, if he had not the temptation of gain. For the same reason, it cannot be necessary that the defendant should collude with one who has an interest. But if collusion were necessary, there seems all the reason in the world to suppose both interest and collusion from the nature of the act; for it is to be hoped that there is not to be found a disposition so diabolical as to prompt any man to injure another without benefiting himself. But it is said, that if this be determined to be law, any man may have an action brought against him for telling a lie by the crediting of which another happens eventually to be injured. But this consequence by no means follows; for in order to make it actionable, it must be accompanied with the circumstances averred in this count, namely, that the defendant, "intending to deceive and defraud the plaintiffs, did deceitfully encourage and persuade them to do the act, and for that purpose made the false affirmation, in consequence of which they did the act." Any lie accompanied with those circumstances, I should clearly hold to be the subject of an action; but not a mere lie thrown out at random without any intention of hurting anybody, but which some person was foolish enough to act upon: for the *quo animo* is a great part of the gist of the action. Another argument which has been made

(*a*) Salk. 211.

use of is, that this is a new case, and that there is no precedent of such an action. Where cases are new in their *principle*, there I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance: but where the case is only new in the *instance*, and the only question is upon the application of a principle recognized in the law to such new case, it will be just as competent to courts of justice to apply the principle to any case which may arise two centuries hence as it was two centuries ago: if it were not, we ought to blot out of our law books one fourth part of the cases that are to be found in them. The same objection might, in my opinion, have been made with much greater reason in the case of *Coggs* v. *Barnard;* for there the defendant, so far from meaning an injury, meant a kindness, though he was not so careful as he should have been in the execution of what he undertook. And, indeed, the principle of the case does not, in my opinion, seem so clear as that of the case now before us, and yet that case has always been received as law. Indeed, one great reason, perhaps, why this action has never occurred, may be that it is not likely that such a species of fraud should be practised unless the party is in some way interested. Therefore I think the rule for arresting the judgment ought to be discharged.

Lord *Kenyon*, C. J.—I am not desirous of entering very fully into the discussion of this subject, as the argument comes to me quite exhausted by what has been said by my brothers. But still I will say a few words as to the grounds upon which my opinion is formed. All laws stand on the best and broadest basis which go to enforce moral and social duties, though indeed it is not every moral and social duty the neglect of which is the ground of an action. For there are, which are called in the civil law, duties of imperfect obligation, for the enforcing of which no action lies. There are many cases where the pure effusion of a good mind may induce the performance of particular duties, which yet cannot be enforced by municipal laws. But there are certain duties, the non-performance of which the jurisprudence of this country has made the subject of a civil action. And I find it laid down by the Lord C. B. *Comyns* (*a*), that "an action upon the case for a deceit lies when a man does any deceit to the damage of

(*a*) Com. Dig. Tit. "Action upon the case for a deceit." A. 1.

another." He has not, indeed, cited any authority for this opinion; but his opinion alone is of great authority; since he was considered by his cotemporaries as the most able lawyer in Westminster Hall. Let us, however, consider whether that proposition is not supported by the invariable principle in all the cases on this subject. In 3 Bulstr. 95, it was held by *Croke*, J., that "fraud without damage, or damage without fraud, gives no cause of action: but where these two do concur, there an action lieth." It is true, as has been already observed, that the judges were of opinion in that case that the action did not lie on other grounds. But consider what those grounds were. *Dodderidge*, J., said, "If we shall give way to this, then every carrier would have an action upon the case: but he shall not have any action for this, because it is merely *his own default* that he did not weigh it." Undoubtedly where the common prudence and caution of man are sufficient to guard him, the law will not protect him in his negligence.* And in that case, as reported in Cro. Jac. 386, the negligence of the plaintiff himself was the cause for which the court held that the action was not maintainable. Then how does the principle of that case apply to the present? There are many situations in life, and particularly in the commercial world, where a man cannot by any diligence inform himself of the degree of credit which ought to be given to the persons with whom he deals; in which cases he must apply to those whose sources of intelligence enable them to give that information. The law of prudence leads him to apply to them, and the law of morality ought to induce them to give the information required. In the case of *Bulstrode*, the carrier might have weighed the goods himself; but in this case the plaintiffs had no means of knowing the state of Falch's credit, but by an application to his neighbours. The same observation may be made to the cases cited by the defendant's counsel respecting titles to real property. For a person does not have recourse to common conversations to know the title of an estate which he is about to purchase: but he may inspect the title-deeds; and he does not use common prudence if he rely on any other security. In the case in *Bulstrode*, the court seemed to consider that *damnum* and *injuria* are the grounds of this action; and they all admitted that, if they had existed in that case, the action would have lain there: for the rest of the judges did not

(*) On this principle depends *Priestly* v. *Fowler*, 3 Mee & Welsb. 1.

controvert the opinion of *Croke*, J., but denied the application of it to that particular case. Then it was contended here that the action cannot be maintained for telling a naked lie: but that proposition is to be taken *sub modo*. If, indeed, no injury is occasioned by the lie, it is not actionable: but if it be attended with a damage, it then becomes the subject of an action. As calling a woman a whore, if she sustain no damage by it, is not actionable: but if she lose her marriage by it, then she may recover satisfaction in damages. But in this case the two grounds of the action concur: here are both the *damnum et injuria*. The plaintiffs applied to the defendant, telling him that they were going to deal with Falch, and desiring to be informed of his credit, when the defendant *fraudulently*, and knowing it to be otherwise, *and with a design to deceive* the plaintiffs, made the false affirmation which is stated on the record, by which they sustained a considerable damage. Then can a doubt be entertained for a moment but that this is injurious to the plaintiffs? If this be not an injury, I do not know how to define the word. Then as to the loss, this is stated in the declaration, and found by the verdict. Several of the words stated in this declaration, and particularly "*fraudulenter*," did not occur in several of the cases cited. It is admitted that the defendant's conduct was highly immoral, and detrimental to society. And I am of opinion that the action is maintainable, on the grounds of deceit in the defendant and injury and loss to the plaintiffs.

Rule for arresting the judgment discharged.

As to the effect produced by this celebrated decision on the operation of the Statute of Frauds, and by St. 9, G. 4, c. 14, sec. 6, upon the class of cases of which this is the leading one, see the note to *Chandelor* v. *Lopus*, ante, vol. i. p. 79. It is shewn in the same note from the cases of *Foster* v. *Charles*, 6 Bingh. 396; 7 Bingh. 108; *Corbet* v. *Brown*, 8 Bingh. 433; and *Polhill* v. *Walter*, 3 B. & Ad. 122, that, in order to prove such fraud as will sustain this action, it is only necessary to shew that what the defendant asserted was false within his own knowledge, and occasioned damage to the plaintiff, a point which had been much mooted in *Haycraft* v. *Creasy*, 2 E. 92.

The expression of opinion by the court in the principal case, that the novelty of the action is no objection, the injury being clearly shewn to exist, is cited in the note to *Ashby* v. *White*, ante, vol. i. 131. In the late case of *Langridge* v. *Levy*, 2 Mee & Welsb. 519, the Court of Exchequer carried the principle of *Pasley* v. *Freeman* somewhat further. It was an action for falsely and fraudulently warranting a gun to have been made by Nock, and to be a good, safe, and secure gun, and selling it as such to the plaintiff's father, *for the use of himself and sons*; one of whom (the plaintiff) confiding in the warranty, used the gun, whereupon it burst, and injured him.

The action was held to be maintainable. "If," said *Parke*, B., delivering judgment, "it (the gun) had been delivered by the defendant to the plaintiff for the purpose of being used *by him*, with an accompanying representation *to him*, that he might safely so use it; and the plaintiff had acted on the faith of its being true, and had received damage thereby; then there is no question but that an action would have lain on the principle of a numerous class of cases, of which the leading one is *Pasley* v. *Freeman*, which principle is, that a mere naked falsehood is not enough to give a right of action: but that it is so if it be a falsehood, told with the intention that it should be acted on by the party injured, and that act must produce damage to him. If, instead of being delivered to the plaintiff *immediately*, the instrument had been placed in the hands of a third person, *for the purpose of being delivered to, and then used by, the plaintiff*, the like false representation being knowingly made to the intermediate person, to be communicated to the plaintiff, and the plaintiff had acted upon it, there can be no doubt but that the principle would equally apply, and the plaintiff would have had his remedy for the deceit, nor can it make any difference, that the third person *also* was intended by the defendant to be deceived; nor does there seem to be any substantial distinction, if the instrument be delivered in order to be so used by the plaintiff, though it does not appear that the defendant intended the false representation itself to be communicated to him. There is a false representation made by the defendant, *with a view that the plaintiff should use the instrument in a dangerous way;* and unless the representation had been made, the dangerous act would never have been done."

This is a remarkable case; it affords an instance in which a party may bring an action for the consequences of a breach of contract, who was not the contractee, and could not have sued upon the contract.

DOE *d.* RIGGE *v.* BELL.

MICH.—34 *G.* 3.

[REPORTED 5 T. R. 471.]

If a landlord lease for seven years by parol, and agree that the tenant shall enter at Lady-day and quit at Candlemas, though the lease be void by the statute of frauds as to the duration of the term, the tenant holds under the terms of the lease in other respects; and therefore, the landlord can only put an end to the tenancy at Candlemas.

THIS ejectment was on the demise of T. Rigge, guardian of H. and M. Rigge, infants. At the trial at the last assizes at York, before the Lord Chief Baron, it appeared, that in January, 1790, Wilkinson, as agent for the lessor of the plaintiff, let the farm in question, called Hague's farm, to the defendant for seven years, by parol. The defendant was to enter when the former tenant quitted, namely, on the land at old Lady-day, and the house on the 25th of May following; and he was to quit at Candlemas. The defendant entered accordingly, and paid rent. A notice to quit at Lady-day last was served on the 22d of September, 1792. It was also proved that both the daughters of the lessor of the plaintiff were above fourteen.

The defendant's counsel objected, first, that the notice to quit was insufficient; the holding being from Candlemas, and the notice requiring the defendant to quit at Lady-day: 2dly. That the lessor of the plaintiff claimed as guardian in socage to his daughters, who were both above the age of fourteen. And the plaintiff was nonsuited.

Chambre, on a former day, obtained a rule, calling on the defendant to shew cause why this nonsuit should not be set aside. As to the first objection, he said, this was a holding from Lady-day, and that, therefore, the notice to quit was

regular; and as to the second, he produced an affidavit, in which it was stated, that one of the daughters of the lessor of the plaintiff was under fourteen years of age.

Cockell, Serjeant, and *Walton*, were now to have shewn cause against the rule; but

Law, *Chambre*, and *Barrow*, were desired to answer the first objection; as to which they argued, that as that agreement for seven years was void by the Statute of Frauds, it being by parol, the defendant must be considered as tenant from year to year, that year commencing at Lady-day when he entered; and that consequently the notice to quit at Lady-day, served more than half a year before, was regular.

Lord *Kenyon*, Ch. J. Though the agreement be void by the Statute of Frauds as to the duration of the lease, it must regulate the terms on which the tenancy subsists in other respects, as to the rent, the time of the year when the tenant is to quit, &c. So where a tenant holds over after the expiration of his term, without having entered into any new contract, he holds upon the former terms. Now, in this case, it was agreed that the defendant should quit at Candlemas; and though the agreement is void as to the number of years for which the defendant was to hold, if the lessor choose to determine the tenancy before the expiration of the seven years, he can only put an end to it at Candlemas.

Rule discharged.

See *Richardson* v. *Gifford*, 2 Ad. & Ell. 52; *Beale* v. *Sanders*, 3 Bingh. N. C. 850; and the note to the next case.

CLAYTON *v.* BLAKEY.

MICH.—39 *G.* 3.

[REPORTED 8 T. R. 3.]

Though by the Statute of Frauds it is enacted that all leases by parol, for more than three years, shall have the effect of estates at will only, such a lease may be made to enure as a tenancy from year to year.

THIS was an action against a tenant for double rent, for holding over after the expiration of his term, and a regular notice to quit. The first count of the declaration stated a holding under a certain term, determinable on the 12th of May then past; and other counts stated a holding from year to year, determinable at the same period. It appeared in evidence, that the defendant had held the premises for two or three years, under a parol demise for twenty-one years from the day mentioned, to which the notice to quit referred; and the Statute of Frauds directing that any lease for more than three years, not reduced into writing, shall operate only as a tenancy at will, it was contended, at the trial of the last assizes for Northumberland, that the holding should have been stated according to the legal operation of it, as a tenancy at will; and as there was no count adapted to that statement, that the plaintiff ought to be nonsuited. *Rooke*, J., however, considering that it amounted to a tenancy from year to year, overruled the objection, and the plaintiff obtained a verdict.

Wood now moved to set aside the verdict, on the ground of a misdirection, relying upon the positive words of the statute.

Lord *Kenyon*, Ch. J. The direction was right, for such a holding now operates as a tenancy from year to year.

The meaning of the statute was, that such an agreement should not operate as a term; but what was then considered as a tenancy at will, has since been properly construed to enure as a tenancy from year to year.

Per Curiam, Rule refused.

These two cases, although loudly impugned by Mr. Watkins, in his able little treatise on conveyancing, have never since been invalidated by judicial decision. Nor does either of them seem inconsistent with the Statute of Frauds. That statute enacts in sec. 1, "That all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to, or out of, any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making and creating the same, or their agents thereunto lawfully authorised by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect, any consideration for making such parol leases to the contrary notwithstanding."

Sec. 2. "Except, nevertheless, all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount to two-third parts at least of the value of the thing demised."

Now it is clear, that the words of these sections are satisfied by holding, that a parol demise for more than three years, creates, *in the first instance*, an estate at will, strictly so called, which estate at will, when once created, may, like any other estate at will, be changed into a tenancy from year to year, by payments of rent, or other circumstances indicative of an intention to create such yearly tenancy; and this perhaps is all which was decided by the two cases in the text, for in *Doe* v. *Bell*, we are expressly told, that *the defendant had paid rent*. And though in *Clayton* v. *Blakey* there is no *express* mention of rent having been paid, yet, as the tenant had been in possession for three years, and that, under a rent, (for the action was for double rent,) it is more than probable that some payment of rent had taken place during that period. Indeed, to deny to such a payment the effect of creating a tenancy from year to year, in cases where the letting was by parol for more than three years, would be to contravene, rather than obey, the enactment of the Statute of Frauds, since that act evidently means that such a parol lease shall enure in every respect as a lease at will. Now one of the incidents of a lease at will is its convertibility, by payment of rent, into a tenancy from year to year. See *Doe* v. *Weller*, 7 T. R. 478; *Roe* v. *Rees*, 2 Bl. 1171; and see 7 Bingh. 458, *ubi, per Tindal*, C. J., "If a party enters and pays, or promises to pay, a rent certain, or settles it in account, (see *Cox* v. *Bent* 5 Bingh. 185,) a new agreement may be presumed, under which the landlord may have a right to distrain." But the decisions (it is believed) have not gone so far as to establish, that a parol lease for more than three years at a fixed rent will, without any other circumstance, create an interest from year to year, so as to give the tenant a right to enter indefeasible except by six months'notice ending with the expiration of the year. Such a construction would, perhaps, be incompatible with the strict letter of the Statute of Frauds; nor (it is believed) has it ever been held, that a parol demise for more than three years, at a fixed rent, even when coupled with the lessee's entry under it, will, before payment or acknowledgment in account of any part of the rent reserved, have the effect of rendering him tenant from year to year. Indeed the contrary appears involved in the late case of *Doidge* v. *Bowers*, 2 Mee & Welsb. 365, where persons entered under a lease for seven years, not signed by the lessor, and, therefore, inoperative

under the Statute of Frauds: payments of rent were made; but not being shewn to have been with the assent of one of the three, it was held, that, as against her, there was no evidence of a tenancy from year to year, she not having resided a year on the premises; *Parke*, B., saying, "*Under the original contract no demise could be created, but a mere tenancy at will.* Then in order to constitute a new tenancy, it must be shewn, that all the three parties agreed to vary it by a new contract for a tenancy from year to year." See *Denn* v. *Fearnside*, 1 Wils. 176; *Goodtitle* v. *Herbert*, 4 T. R. 680.

Tenancies from year to year seem to have owed their origin to the prevalence of a strong and very natural feeling of the justice and good policy of allowing a tenant who has sowed to reap. This feeling manifested itself during the earliest ages of our law in the doctrine of *emblements*, which entitled a tenant at will to the crops he had sowed, and gave him free ingress and egress to reap and carry them, after the determination of his tenancy by the landlord. (See Litt. sec. 68, *and the Commentary*.) Now the land could have been but of very little value to the landlord while covered with crops belonging to his late tenant and subject to such a right of entry; and to give those crops and that right of entry to a tenant at will was in effect to say that his *enjoyment* of the land should not be put an end to by the determination of the landlord's will respecting his estate in it. But people were apt to confound the distinction between the right to the enjoyment and the right to the estate; and seeing that the landlord could not arbitrarily put an end to the former, they concluded that he was similarly restrained as to the latter. "So long ago," says Lord *Kenyon*, in *Doe d. Martin* v. *Watts*, 7 T. R. 85., "as the time of the year-books, it was held that a general occupation was an occupation *from year to year*, and that the tenant could not be turned out of possession without *a reasonable notice to quit*." The passage in the year-books referred to by his lordship, is 13 Hen. 8, 15 b, *ubi, per Wilby*, "*Si le lessor ne done a luy garnir devant le demy an il justifiera in auter an et issint de an in an.*" And it was better for the lessor himself to establish this custom, since a late tenant at will entitled to emblements would have had the whole profits of the land, from the determination of the will till the harvesting of the crops, without paying any rent for it; whereas the tenant from year to year pays rent until the day on which he quits the premises. It is now well settled, that the *reasonable notice to quit* to which the tenant is entitled, is half-a-year's notice, ending with the period at which his tenancy commenced. *Doe* v. *Porter*, 3 T. R. 13.

There is no doubt, however, that a tenancy *at will*, strictly speaking, *may* still be created. It may be so by express words, *Richardson* v. *Langridge*, 4 Taunt. 128; *Cudlip* v. *Rundle*, 4 Mod. 9; *R.* v. *Fillongley*, Cald. 569. A person who holds rent free by the permission of the owner is a tenant at will. *R.* v. *Collett*, Russ. & Ry. C. C. 498; *ex. gr.*, a minister placed in possession by trustees for the congregation. *Doe* v. *Jones*, 10 B. & C. 718; *vide tamen Wilkinson* v. *Malin*, 2 Tyrwh. 544. So a person entering under an agreement to purchase, or for a lease, and who has not paid rent. See *Regnart* v. *Porter*, 7 Bingh. 451. *Doe* v. *Miller*, 5 C. & P. 595. On payment of rent, however, he becomes tenant from year to year. *Mann* v. *Lovejoy*, R. & M. 355. It has already been shown in the notes to *Keech* v. *Hall*, that there are certain cases in which a mortgagor in possession becomes tenant at will to the mortgagee.

GEORGE *v.* CLAGETT.

TRINITY.—37 *GEO.* 3.

[REPORTED 7 T. R., 359.]

If a factor sells goods as his own, and the buyer knows nothing of any principal, the buyer may set off any demand he may have on the factor against the demand for the goods made by the principal.

ON the trial of this action, which was assumpsit for goods sold and delivered to the amount of 142*l.* 1*s.* 9*d.*, before Lord *Kenyon* at the Guildhall Sittings, the case appeared to be this: The plaintiff, a clothier at Frome, employed Messrs. Rich and Heapy in London, Blackwell-hall factors, as his factors under a commission *del credere*, who, besides acting as factors, bought and sold great quantities of woollen cloths on their own account, all their business being carried on at one warehouse. The factors sold at twelve months' credit, and were allowed two and a half *per cent.* On the 30th of September, 1795, Delvalle, a tobacco broker, and who had been in habits of dealing with the defendants, bought several parcels of tobacco of them, and gave them in payment a bill of exchange for 1198*l.* 16*s.*, drawn by one Fisher on Rich and Heapy, on the 24th of September, 1795, payable two months after date to J. Stafford, who indorsed to Delvalle, who indorsed it over to the defendants, it having been previously accepted by Rich and Heapy. On the 12th of October, 1795, the defendants bought a quantity of woollen cloths for exportation of Rich and Heapy, amounting to 1237*l.* 18*s.* 3*d.* at twelve months' credit; the goods were taken out of one general mass in Rich and Heapy's warehouse; Rich and Heapy made out a bill of parcels for the whole in their own names, and the

defendants did not know that any part of the goods belonged to the plaintiff. Early in November, 1795, Rich and Heapy became bankrupts; and afterwards, on the 20th of the same month, the plaintiff gave the defendants notice not to pay Rich and Heapy for certain cloths specified, part of the above, amounting to 142*l.* 1*s.* 9*d.*, they having been his property, and having been sold on his account by Rich and Heapy on commission. The question was, Whether the defendants were or were not entitled to set off their demand against Rich and Heapy on the bill of exchange, on the ground that the defendants dealt with them as principals; Lord *Kenyon* was of opinion that they were, as well on principle as on the authority of *Rabone* v. *Williams* (*a*); and a verdict was accordingly found for the defendants.

A rule having been obtained, calling on the defendants to show cause why the verdict should not be set aside, and a new trial had, on the authority of the case of *Estcott* v. *Milward*, Co. Bank Laws, 236.

Gibbs and *Giles* were now to have shown cause against that rule: but

Erskine and *Walton* were called upon to support it. They relied on the cases of *Scrimshire* v. *Alderton* (*b*), and *Estcott* v. *Milward* as reported in Co. Bank Laws, to show that under the circumstances of this case the principal might resort to the buyer at once, he having given notice before actual payment by the defendants to the factors.

(*b*) 2 Str. 1182.

But a more accurate note of the case of *Estcott* v. *Milward* (*c*) having now been obtained from Mr. J. *Buller*, before whom that cause was tried, and read:

(*a*) *Rabone, jun.* v. *Williams*, Midx. Sittings after Mich., 1785; which was thus stated:—Action for the value of goods sold to the defendant by means of the house of Rabone, sen. and Co. at Exeter, factors to the plaintiff. The defendant, the vendee of the goods, set off a debt due to him from Rabone and Co. the factors, upon another account, alleging that the plaintiff had not appeared at all in the transaction, and that credit had been given by Rabone and Co., the factors, and not by the plaintiff. Lord *Mansfield*, Ch. J.—"Where a factor, dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has right to consider him to all intents and purposes as the principal; and though the real principal may appear, and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor in answer to the demand of the principal. This has been long settled." Upon this opinion, the rest, being a mere matter of account, was referred. In *Bayley* v. *Morley*, London Sittings after Mich. 1788, Lord *Kenyon* recognised the law of this case.

(*c*) London Sittings after Mich. 1783. Action for goods sold. The goods were sold by Farrar, a corn-factor, who gave no account of the sale to the plaintiff, nor made any entry of it in his books. He was insolvent for some time before, and avoided all dealing for a month, had desired that there might be no buying in his name, and had not dealt with the defendant for a year before, but was then in his debt. There was a verdict for the plaintiff on the ground of fraud.

The *Court* were clearly of opinion that the directions given by the learned judge on the trial of this cause were right; and that this case was not distinguishable from that of *Rabone* v. *Williams*. Therefore they

Discharged the rule. (*a*)

This decision too clearly results from principles of natural equity to need much discussion or explanation. It has ever since been followed. See *Coates* v. *Lewis*, 1 Camp. 444; *Blackburne* v. *Scholes*, 2 Camp. 343; *Carr* v. *Hinchcliffe*, 4 B. & C. 551; *Taylor* v. *Kymer*, 3 B. & Ad. 334; *Bastable* v. *Poole*, 5 Tyrwh. 111; and *Sims* v. *Bond*, 5 B. & Ad. 393, where the rule is thus expressed by the Lord *C. J.* delivering the judgment of the court:— "It is a well-established rule of law, that where a contract, not under seal, is made with an agent in his own name for an undisclosed principal, either the agent, or the principal, may sue upon it; the defendant, in the latter case, being entitled to be placed in the same situation at the time of the disclosure of the real principal, as if the agent had been the contracting party." (*See further on this subject in the notes to Paterson* v. *Gandasequi*, *Addison* v. *Gandasequi*, and *Thomson* v. *Davenport*, *post*.)

However the latter part of this rule only applies where the party contracting has not the means of knowing that the party with whom he contracts is but an agent. If he have the means of knowing, and, though he may not be expressly told, still must be supposed to have known, that he was dealing not with a principal, but with an agent, the reason of the above rule ceases, and then, *cessante ratione, cessat lex*. Thus in *Baring* v. *Corrie*, 2 B. & A. 137. Coles and Co., who were brokers and also merchants, sold to Corrie and Co. in their own names, sugars belonging to Baring, Brothers, and Co., who brought this action for the price. The true nature of the contract was entered by Coles and Co. in their broker's book, which the defendants might, if they pleased, have seen. Nor had Coles and Co. the possession of the sugars, which were lying in the W. I. Docks, whence by the usage of the docks, they could not have been taken, without the order of the plaintiffs, whose principal clerk signed the delivery order. Under these circumstances, the court held that the defendants had no right to set off against the plaintiffs' demand for the price of the goods, a debt due to them from Coles and Co. "It is to be observed," said *Bayley*, J., "that the plaintiffs did not trust the brokers with either the muniments of title, or the possession of the goods, as was done in both the cases of *Rabone* v.

(*a*) The same point was also ruled by Lord *Kenyon* in *Stracey, Ross, and others*, v. *Deey*, London Sittings after Mich. 1789. Assumpsit for goods sold: pleas non-assumpsit and a set-off. The plaintiffs jointly carried on trade as grocers, but Ross was the only ostensible person engaged in the business, and appeared to the world as solely interested therein. By the terms of the partnership, Ross was to be the apparent trader, and the others were to remain mere sleeping partners. The defendant was a policy-broker, and being indebted for grocery (as he conceived) to Ross, he effected insurances and paid premiums on account of Ross solely, to the amount of his debt, under the idea that one demand might be set off against the other. Ross's affairs being much deranged, payment of the money due from the defendant was demanded by the firm, and was refused by him upon the ground of his having been deceived by the other partners keeping back and holding out Ross as the only person concerned in the trade. Lord *Kenyon*, Ch. J., was of opinion, that as the defendant had a good defence by way of set-off as against Ross, and had been by the conduct of the plaintiffs led to believe that Ross was the only person he contracted with, they could not now pull off the mask and claim payment of debts supposed to be due to Ross alone, without allowing the parties the same advantages and equities in their defence that they would have had in actions brought by Ross.

Verdict for the defendant.

Williams and *George* v. *Clagett.* There is another circumstance by which the defendants might easily have ascertained whether Coles and Co. acted as brokers or no. According to the usual course of dealing, a broker is bound to put down in his book an account of the sales made by him in that capacity, so that, if the defendants had asked to see the book, they would instantly have discovered whether Coles and Co. acted as brokers or not. I therefore think, that the plaintiffs did not by their conduct enable Coles and Co. to hold themselves out as the proprietors of these goods so as to impose on the defendants; that the defendants were not imposed on; and even supposing that they were, they must have been guilty of gross negligence. . . . I cannot think that the defendants believed, when they bought the goods, that Coles and Co. sold them on their own account; and if not, they can have no defence to this action." See further, *Maans* v. *Henderson*, 1 East, 335; *Moore* v. *Clementson*, 2 Campb. 22.

SMITH *v.* HODSON.

HIL. 31 *G.* 3. *B. R*

[REPORTED 4 T. R. 211.]

If a bankrupt on the eve of his bankruptcy fraudulently deliver goods to one of his creditors, the assignees may disaffirm the contract, and recover the value of the goods in trover: but if they bring assumpsit, *they affirm the contract, and then the creditor may set off his debt.*

Where the defendant lent his acceptance to the bankrupts on a bill which did not become due till after the act of bankruptcy, and was then outstanding in the hands of third persons, yet the defendant, having paid the amount after the commission issued, and before the action brought by the assignees, is entitled to a set-off.

ASSUMPSIT for goods sold and delivered to the defendant by the bankrupts, before, and also by the assignees since, the bankruptcy. Pleas *non assumpsit*, and a tender of 131*l.* 7*s.* 6*d.*, which the plaintiffs took out of court. There was also a set-off. At the trial at Guildhall before Lord *Kenyon*, a verdict was found for the plaintiffs, subject to the opinion of this court on the following case:—

In August, 1787, Lewis and Potter sold goods to the defendant to the amount of 42*l.*, and on the 4th of March, 1788, they drew a bill on him at two months, for 442*l.*, payable to their own order, although at that time he was indebted to them in 42*l.* only; which bill the defendant accepted. Lewis and Potter made the following entry in their books: "4th of March, 1788, received from James Hodson an acceptance, due 7th May, 442*l.* to bills and notes; to provide 400*l.*" On 26th April several bills were refused payment by Lewis and Potter, some of which were

presented by bankers on behalf of the indorsees. On the 28th April, 1788, the defendant went to the house of Lewis and Potter, and bought goods to the amount of 531*l.* 7*s.* 6*d.*, which were sent to him with a bill of parcels the same day; the goods were sold to the defendant at six months' credit. On the 29th of April, 1788, Lewis and Potter committed acts of bankruptcy. On the 9th of May the commission issued, and they were duly declared bankrupts, and the plaintiffs chosen assignees of their estate and effects. The bill for 442*l.*, drawn by the bankrupts, and accepted by the defendant, became due the 7th of May, 1788: the defendant did not pay it on that day, but in September following paid to Gibson and Johnson, the holders thereof, 200*l.* on account of the bill; and in October following, before the six months' credit upon the goods was expired, he paid the residue with interest. The jury thought the bankrupts gave an undue preference to the defendant in the sale; and gave a verdict for the plaintiffs, damages 400*l.** The questions for the opinion of the court are, 1st, Whether the plaintiffs can support this action for the price of the goods? 2dly, If they can support this action, whether the defendant cannot set off against it the money paid by him on the above-mentioned bill for 442*l.*?

(*) A fraudulent preference may be by way of *sale*. See *Cook* v. *Caldecott*, 1 M. & M. 524; *Ward* v. *Clark*, *ib.* 499; *Devas* v. *Venables*, 3 Bingh. N.C. 300; *Cash* v. *Young*, 2 B. & C. 413.

Russel, for the plaintiffs, was desired by the court to confine himself to the second point, as they entertained no doubt upon the first. As to which he contended that though the sale were good to charge the defendant in this action, yet he was not entitled to support his set-off under the 5 Geo. 2, c. 30, s. 28 (*a*). The words which will be relied on are *mutual credit*: but they were by no means intended to be used in so extensive a sense as the one now put on them by the defendant. The giving of *credit* is merely giving a future day of payment for a pre-existing debt; and to entitle a defendant to set it off, it must exist previous to the act of bankruptcy. As where goods are sold to be paid for at a future day, the vendee becomes a debtor for the value upon the delivery, though payment cannot be

(*a*) Which enacts, that where "there hath been mutual credit given by the bankrupt and any other person, or mutual debts between the bankrupt and any other person, at any time before such person became bankrupt, the commissioners, &c. shall state the account between them, and one debt may be set against another; and what shall appear to be due on either side, on the balance of such account, and on setting such debts against one another, and no more, shall be claimed or paid on either side respectively." The corresponding enactment now in force is 6 G. 4, c. 16, s. 50. See the notes to *Rose* v. *Hart*, *post*.

exacted from him till the day arrives: in the mean time the vendor is his creditor to that amount; and in that sense only is the word *credit* to be understood in the act. This appears further from the subsequent words of the statute: for the commissioners are directed to *state the account* between the parties, and claim or pay only so much as shall appear *due on the balance of such account*. In order, therefore, for a party to set off any demand, it must be such as may be made an item in the account, and either certain or reducible to a certainty at the time of the act of bankruptcy committed. The act itself says, that the balance of the account is to be made appear "on setting *such debts* against one another;" which plainly shows that nothing more was meant by the word *credits* than such *debts* as were payable at a future day. Then how does the statute apply to this case? There was no debt existing between the bankrupts and the defendant at the time of the bankruptcy; nor was it certain there ever would be one; for in case of the defendant's bankruptcy or refusal to pay, the holder might have proceeded against the estate of the drawers, and recovered the amount; and that perhaps after the defendant's acceptance had been admitted as an item of account between him and the bankrupts: and at all events no debt could arise till after payment by the defendant, which was long after the bankruptcy, and therefore could not be set off; for at that time the bill was outstanding in the hands of third persons, and was therefore the subject of mutual credit, if at all, between them and the bankrupts. But in *Groome*'s case (*a*), Lord *Hardwicke* was clearly of opinion that a debt arising on a contingency after the bankruptcy could not be set off; and it has been determined, that though a note indorsed after an act of bankruptcy may be proved under a commission against the drawer (*b*), yet it cannot be set off against an action by his assignees (*c*). The cases *Ex parte Deeze* (*d*), *Ex parte Prescot* (*e*), and *French*, assignee of *Cox* v. *Fenn* (*f*), were all of them cases where the bankrupts were actually indebted to the defendants before the bankruptcies, in the sums which they set off against the demands of the assignees; which differs them materially from the present: but even supposing this were such a demand as could in a fair transaction be set off in a court of law under the statute, yet it cannot avail the defendant in this case,

(*a*) 1 Atk. 119.

(*b*) *Ex-parte Thomas*, 1 Atk. 73.
(*c*) *Marsh* v. *Chambers*, *vide tamen* 6 G. 4, c. 16, s. 50, and 3 Mee& Welsb.30, 2 Str. 1234.
(*d*) 1 Atk. 228.
(*e*) *Ib.* 230.
(*f*) Tr.23 Geo.3, Co. Bk. L. 2d ed.

where the whole is vitiated by fraud. It therefore becomes material to examine what part of the transaction may be substantiated, and what is void. There is no fraud in the mere act of sale; and the defendant must be bound by that so far as he made himself liable for the amount of the goods; that would have been the case had the sale been made to a person who was no creditor of the bankrupt's; but the objection arises to the fraudulent use now attempted to be made of the sale. No party is entitled to set off a demand against the assignees of a bankrupt, for which he could not have maintained an action, or which he could not have proved under a commission. Now, if the defendant could not have done either in the present instance before the bankruptcy, he shall not be permitted to recover the amount indirectly in this manner; for that would be to permit him to avail himself of his own fraud.

Gibbs, for the defendant, insisted, first, That if the whole were to be considered as a *bonâ fide* transaction, the defendant was entitled to set off the sum paid under his acceptance; and 2dly, That the finding of the jury, as to the undue preference, could not vary the case in favour of the plaintiffs in *this* action. The first question depends on the stat. 5 Geo. 2, c. 30, s. 28; the true construction of which is, that wherever there is *mutual credit* between the bankrupt and another person before the bankruptcy, the debts may be set off against each other, although one of them may accrue after the bankruptcy, and although that one debt could not form an item of an account, so as to enable the bankrupt and such other person to strike a balance. The plaintiff's argument, That nothing can be set off under the statute, but that which may form an item of an account at the time of the bankruptcy, and the payment of which is only postponed for a time, directly militates against the decision of *French* v. *Fenn.* If that case be law, the construction now attempted to be put on this statute by the plaintiff's counsel cannot prevail. In that case Fenn owed nothing to Cox previous to the bankruptcy: so here Lewis and Potter owed Hodson nothing previous to their bankruptcy; but Fenn had been intrusted by Cox with that upon which he probably would become debtor, namely, the sale of the jewels, in which Cox was interested one-third part; so Lewis and Potter had been intrusted by Hodson

with that upon which they probably would become his debtors, *sc.* with his acceptance for 442*l.*, he having effects to the amount of 42*l.* only; there Fenn, upon the credit of the jewels intrusted to him, trusted Cox on another account; so here Lewis and Potter, on the credit of the acceptance intrusted to them, trusted Hodson on another account, namely, for the goods in question; there, after the bankruptcy of Cox, Fenn *received* a sum of money upon the sale of the jewels intrusted to him, which became due to Cox's estate; so here, after the bankruptcy, Hodson *paid* a sum of money upon the acceptance intrusted to them, for which he has a claim upon their estate. In that case the court allowed the set-off; and yet at the time of Cox's bankruptcy no balance could have been struck between the parties, because the defendant's claim arose from the produce of the pearls afterwards. What that produce would be, could not be known at the time of the bankruptcy, and consequently could not then form an item in an account between the parties. Secondly, The finding of the jury, as to the undue preference, is either nugatory as to the plaintiffs, or it operates as a ground of nonsuit. The plaintiffs have an option either to affirm or disaffirm the contract: if the former, the defendant is entitled to set off his demand; if the latter, though the plaintiffs might recover in trover, they cannot maintain this action. The jury found that there was a fraud *in the sale:* the plaintiffs cannot therefore contend that the fraud is confined to the *use* made of the sale. If the defendant had obtained his defence by fraud, it would not have availed: but it does not follow that, because there was a fraud in the sale of goods, from the bankrupt to the defendant, the latter shall not set off a cross demand against the price of the goods. The fraud (if any) was in the sale of the goods; and the effect which it has is this (*a*), *viz.* that the bankrupt conveyed no property in the goods to the defendant, and that it was a naked delivery; if so, the plaintiffs should bring trover, not assumpsit.

(*a*) Cook B. L. 2d ed.

Russell in reply.—With respect to the case of *French* v. *Fenn,* which seems to have been principally relied on by the other side, there are two very material distinctions between that and the present case: there did exist mutual debts between the parties in that case, though the precise

amount was not actually ascertained at the time of the bankruptcy; but still it was capable of being reduced to a certainty at any time by the sale of the jewels; and if Fenn had become a bankrupt instead of Cox, it cannot be denied but that Cox might have come in under Fenn's commission for a third of the value of those jewels. Again: In that case the jewels were in the hands of the party between whom and the bankrupt the account was to be settled, and the mutual debts and credits allowed; whereas here the acceptance was in the hands of third persons at the time of the bankruptcy, without any certainty that it would ever be discharged by the defendant.

Cur. adv. vult.

Lord *Kenyon*, C. J., now delivered the opinion of the court. His Lordship, after stating the facts, said, We have considered this case, and are of opinion that the defendant has made a sufficient defence against the action in its present form, and consequently that a judgment of *nonsuit* must be entered. It is expressly stated in the case, that the goods in question were delivered by the bankrupts to the defendant with a view to defraud the rest of the creditors; and therefore an action might have been framed to disaffirm the contract, which was thus tinctured with fraud; for if the assignees had brought an action of trover, they might have recovered the value of the goods. The statute 5 Geo. 2, c. 30, s. 28, enacts, That where it shall appear to the commissioners that there hath been *mutual credit* between the bankrupt and any other person, or mutual debts between the bankrupt and any other person, before the bankruptcy, the commissioners or the assignees shall state the account between them, and one debt may be set against another; and the balance only of such accounts shall be claimed and paid on either side, in the most extensive words; and therefore we are perfectly satisfied with the cases *Ex parte Deeze* (*a*), and *French* v. *Fenn;* but if an action of trover had been brought instead of assumpsit, this case would have differed materially from those two; because in both those cases the goods had got into the hands of the respective parties prior to the bankruptcy, and without any view of defrauding the rest of the creditors; and therefore, according to the justice of those cases, whether trover or

(*a*) 1 Atk. 228.

assumpsit had been brought, the whole account ought to have been settled in the way in which it was, because the situation of the parties was not altered with a view to the bankruptcy: but here it was; and if trover had been brought, the defendant would have had no defence; and those cases would not have availed him. But this is an action on the contract, for the goods sold by the bankrupt: and although the assignees may either affirm or disaffirm the contract of the bankrupt, yet if they do affirm it they must act consistently throughout; they cannot, as has often been observed in cases of this kind, blow hot and cold: and as the assignees in this case treated this transaction as a contract of sale, it must be pursued through all its consequences, one of which is, that the party buying may set up the same defence to an action brought by the assignees, which he might have used against the bankrupt himself; and consequently may set off another debt which was owing from the bankrupt to him. This doctrine is fully recognised in *Hitchin* v. *Campbell* (*a*), and in *King* v. *Leith* (*b*). Now here the assignees, by bringing this action on the contract, recognised the act of the bankrupt, and must be bound by the transaction in the same manner as the bankrupt himself would have been: and if he had brought the action, the whole account must have been settled, and the defendant would have had a right to set off the amount of the bill. Therefore, on the distinction between the actions of trover and assumpsit, we are all of opinion that a judgment of nonsuit must be entered.

(*a*) 2 Bl. Rep. 827.
(*b*) 2 T. R. 141.

Judgment of nonsuit (*).

(*) See *Atkinson* v. *Elliott*, 7 T. R. 378, *Smith* v. *Gale*, *ib.* 364; and See *Hulme* v. *Mugglestone*, 3 Mee & W 30.

This case is one of frequent reference upon the subject of *mutual credit;* but, as the leading case upon that branch of law is unquestionably *Rose* v. *Hart*, it seems best to append any remarks on the doctrines of mutual credit and set-off to that decision. The important principle which *Smith* v. *Hodson* is here inserted as establishing, is, that a man who has his option whether he will affirm a particular act or contract, must elect either to affirm or disaffirm it altogether; he cannot adopt that part which is for his own benefit, and reject the rest. "He cannot," to use Lord *Kenyon's* expression, "blow hot and cold." This principle, as his lordship in the text observes, is older than the case of *Smith* v. *Hodson*. In *Wilson* v. *Poulter*, 2 Str. 859, an agent had been secretly employed on behalf of a bankrupt after his bankruptcy, to lay out money upon India bonds. The assignee, upon discovering the fact, seized some of the bonds in the agent's hands, and accepted them as part of the estate, and then brought an action against him for the money with which the other bonds were purchased. The court was of opinion that

the acceptance of part of the bonds was an affirmance of the agent's act, and that the assignees could not affirm one part and disaffirm another. In *Billon* v. *Hyde*, 1 Atk. 128, a bankrupt had, in the course of dealing, after the bankruptcy, paid 3000*l.* to petitioner; and petitioner had in the same dealing paid the bankrupt 712*l.* Lord *Hardwicke* decreed that the assignees, having adopted the bankrupt as their factor, must take him as such, for every purpose; and he decreed that the 712*l.* should be allowed. The doctrine laid down in the text has been frequently acted on since the decision of *Smith* v. *Hodson*. It will be found laid down by Lord *Ellenborough*, in *Hovil* v. *Pack*, 7 East, 164; and by Lord *Tenterden* in *Ferguson* v. *Carrington*, 9 B. & C. 59. On the same principle proceeded the decision in *Birch* v. *Wright*, 1 T. R. 378, cited *ante*, vol. i. 296, in the notes to *Keech* v. *Hall*, and which establishes that a man cannot at once be treated both as a tenant and a trespasser. That was an action for use and occupation, brought against the defendant, who, on the 18th July, 1777, was tenant of certain land to Bowes, at 223*l.* 10*s.* per annum, payable on the 12th of May and 22d of November. Bowes had, on the 17th July, 1777, conveyed the reversion by way of security to the plaintiff and Goostrey, who was since dead, and they had brought an ejectment for the lands against the defendant, and obtained judgment, laying their demise on 6th April, 1785, and in September, 1785, had obtained possession. All rent had been paid up to the 22d November, 1784, except the sum of 81*l.* 15*s.* Under these circumstances, the court held, that the plaintiff was entitled to the unpaid rent, up to the day of the demise laid in the ejectment, *viz.*, 6th April, 1785; but not to any rent for the time which had elapsed since. "The plaintiff," said *Buller*, J., "has not waived the tort. He has brought his ejectment, and obtained judgment in it, which is insisting on the tort, and he cannot be permitted to blow both hot and cold at the same time. The action for use and occupation, and the ejectment, when applied to the same time, are totally inconsistent; for in one the plaintiff says, that the defendant is his tenant, and therefore must pay him rent; in the other, he says, that he is no longer his tenant, and therefore, must deliver up the possession. He cannot be allowed to do both. The plaintiff's counsel admit, that an action would lie for the mesne profits; it is of course after ejectment, and may be maintained without proving any title. (See the notes to *Aslin* v. *Parkin*, *ante*, vol. i. 265.) The ejectment is the suit in which the defendant is considered as a trespasser; and unless the ejectment be laid out of the case, the tort is not waived. The defendant stands convicted by judgment on record as a trespasser from the 6th of April, 1785."

It seems extraordinary that the principal case of *Smith* v. *Hodson* should not have been mentioned in the argument of *Buchanan* v. *Findlay*, 9 B. & C. 742. It is true that it is distinguishable from that case; but the distinction was not then established, as it has been since by *Thorpe* v. *Thorpe*. In *Buchanan* v. *Findlay*, the assignees of certain bankrupts sued the defendants for money had and received by the defendants to the use of the bankrupts before, and of the assignees after, the bankruptcy. The bankrupts, who were merchants at Liverpool, had remitted a bill to the defendants, who were merchants in London, with directions to get it discounted, and apply the proceeds in a particular way. The defendants did not get it discounted, but received the money when it became due, which happened after the bankruptcy. Before the bankruptcy, the bankrupts had requested to have the bill returned to them. It was held that the defendants could not, in this action by the assignees, set off a debt due to them by the bankrupts. This case was fully canvassed and explained in *Thorpe* v. *Thorpe*, 3 B. & Adol. 580. In that case, the defendant had received from the plaintiff a bill, indorsed and payable to plaintiff, for the purpose of being paid to W.; he had not paid it to W., but had received the money at the maturity of the bill; and the question was, whether, in an action for that money, he could plead a set-off. The court held that he might. "If," said *Parke*, J., "the plaintiff had chosen, instead of *assumpsit* for

money had and received, to bring a special action for the breach of duty, there could have been no set-off, because it would have been an action for unliquidated damages. But, by bringing *assumpsit* for money had and received, he lets in the consequences of that action, one of which is the right of set-off. The expressions of the court, in *Buchanan* v. *Findlay*, must be taken with reference to the subject-matter. In that case, the bills remained in the hands of the defendants, unapplied to the purpose for which they had been sent, when the parties who had sent them countermanded the order for their being discounted, and required to have them returned, which was not done. It was not a case of mutual credit, because the transaction, on the part of the defendants, was against good faith. The assignees, in that case, did not affirm any contract by bringing an action for money had and received, which merely stood in the place of an action of trover."

Brewer v. *Sparrow*, 7 B. & C. 310, and *Burn* v. *Morris*, 4 Tyrwh. 486, are also two cases *ejusdem generis*, in one of which the principle laid down in *Smith* v. *Hodson* was held applicable, while the other was considered distinguishable. In *Brewer* v. *Sparrow*, 7 B. & C. 310, the assignees of a bankrupt brought *trover* for chattels of the bankrupt, of which the defendant had taken possession. The chattels were part of the bankrupt's stock in trade, which, on the bankrupt's absconding, the defendant had taken possession of, and carried on the trade. He had, however, rendered to the assignees a fair account, and paid over the balance. "The defendant," said *Bayley*, J., "in the first instance, was a wrongdoer, and the plaintiffs might have treated him as such. But it was competent to them, in their character of assignees, either to treat him as a wrongdoer and disaffirm his acts, or to affirm his acts, and treat him as their agent; and if they have once affirmed his acts, and treated him as their agent, they cannot afterwards treat him as a wrongdoer, nor can they affirm his acts in part and avoid them as to the rest. By accepting and retaining the balance without objection, they affirmed his acts, and recognised him as their agent; and having so done, they are not at liberty to treat him as a wrongdoer." Judgment for defendant.

The above case was relied on as in point, but held distinguishable, in *Burn* v. *Morris*, 4 Tyrwh. 486. That was an action of trover, brought for a 20*l.* Bank note, lost by a clerk of the plaintiff, found by a woman in the street, taken, at her request, by the defendant's son to the Bank, and there changed by his father's directions, and the proceeds, *minus* two sovereigns, given back to the woman. The woman was afterwards taken before the Lord Mayor, and seven sovereigns, part of the proceeds, found on her, and given back to the plaintiff. After a verdict for 13*l.*, it was moved, in pursuance of leave, to enter a nonsuit, upon the ground that the receipt of the 7*l.* was an affirmance of the whole transaction. *Brewer* v. *Sparrow* was cited; but Lord *Lyndhurst* said, "In that case the whole proceeds of the sale were taken: that is an adoption of the act. Here the receipt of the 7*l.* does not ratify the act of the parties, but only goes in diminution of damages."

DOVASTON *v.* PAYNE.

35 *GEO.* 3, *C. P.*

[REPORTED 2 HEN. BL. 527.]

The property of a highway is in the owner of the soil, subject to an easement for the benefit of the public. Therefore a plea in bar of an avowry for taking cattle damage feasant, that the cattle escaped from a public highway into the locus in quo, *through the defect of fences, must show that they were* passing on the highway *when they escaped; it is not sufficient to state that* being *in the highway they escaped.*

REPLEVIN for taking the cattle of the plaintiff. Avowry, that the defendant was seised in fee of the *locus in quo*, and took the cattle damage feasant. Plea, that the *locus in quo* "lay contiguous and next adjoining to a certain common and public king's highway, and that the defendant and all other owners, tenants, and occupiers of the said place in which, &c., with the appurtenances, for the time being, from time whereof the memory of man is not to the contrary, have repaired and amended, and have been used and accustomed to repair and amend, and of right ought to have repaired and amended, and the said defendant still of right ought to repair and amend the hedges and fences between the said place in which, &c., and the said highway, when and so often as need or occasion hath been or required, or shall or may be or require to prevent cattle *being in the said highway* from erring and escaping thereout into the said place in which, &c., through the defects and defaults of the said hedges and fences, and doing damage there. And because the said hedges and fences between the said place in which, &c., and the said highway, before and at the time when, &c., were ruinous, broken down, prostrated, and in great decay for want of needful and necessary repairing

and amending thereof, the said cattle in the said declaration mentioned just before the said time when, &c., *being in the said highway*, erred and escaped thereout, into the said place in which, &c., through the defects and defaults, &c. &c." To this plea there was a special demurrer, For that it is not shown in or by the said plea, that the said cattle before the said time when, &c., when they escaped out of the said highway into the said place in which, &c., *were passing through and along the said highway*, nor that they had any *right to be there* at all, &c.

In support of the demurrer, *Williams*, Serjt., argued as follows: It is a rule in pleading, that if the defendant admits the fact complained of, he must show some good reason for or justification of it. If the cattle in this case had escaped from an adjoining close through the default of the plaintiff's fences, the defendant must have shown that he had an interest in that close, or a licence from the owner to put his cattle there; Dyer, 365 *a*, Sir F. *Leke's case*, recognised Hob. 104, *Digby* v. *Fitzherbert;* for a man is bound to repair against those who have right, but not against those who have no right. So if cattle escape from a highway, the party justifying a trespass must show they were lawfully using the highway, that is, were passing and repassing on it, which is material and traversable. It is not sufficient that they were simply in it, the *being* there is equivocal and not traversable. The owner of the soil may have trespass, if the cattle do anything but merely pass and repass, Bro. Abr. *Tresp.* pl. 321, and according to this principle the entries state, in pleas of this kind, that the cattle were *super viam prædictam transeuntes*, Thomp. Entr. 296, 297; and in Herne's Plead. 822, that they were "*driven along the highway*."

Heywood, Sergt. *contrà*.—The same strictness is not required in a plea in bar to an avowry in replevin, as in a justification in trespass. Here the plaintiff pleads the plea, and it is sufficient for him to show that his cattle were wrongfully taken. The *passing* on the highway is as uncertain as the *being* there, and as little traversable. But the material issues on the record would be, whether the fences were out of repair, and whether the defendant was bound to repair them. If he were, it is immaterial whether the cattle were passing on the highway or not. In a plea in

bar, certainty to a common intent is sufficient. It may therefore be intended that the cattle were lawfully in the highway.

Lord C. J. *Eyre.*—I agree with my brother Williams as to the general law that the party who would take advantage of fences being out of repair, as an excuse for his cattle escaping from a way into the land of another, must show that he was lawfully using the easement when the cattle so escaped. This therefore reduces the case to a single point, namely, Whether it does not appear on the plea, to a *common intent*, that the cattle were on the highway using it in such a manner as the owner had a right to do, from the words "*being in the said highway?*" This is a different case from cattle escaping from a close, where it is necessary to show that the owner had a right to put them there, because a highway being for the use of the public, cattle may be in the highway of common right; I doubt, therefore, whether it requires a more particular statement. It would certainly have been more formal, to have said that the cattle were passing and repassing; and if the evidence had proved that they were grazing on the way, though the issue would have been literally, it would not have been substantially proved. But I doubt whether the being in the highway might not have been traversed; and if the *being* in the highway can be construed to be certain to a common intent, the plea may be supported, notwithstanding there is a special demurrer, for a special demurrer does not reach a mere literal expression. The precedents indeed seem to make it necessary to state that the cattle were passing and repassing, but they are but few; yet upon the whole, I rather think the objection a good one, because those forms of pleading are as cited by my brother Williams.

Buller, J.—This is so plain a case, that it is difficult to make it a ground of argument. But my brother Heywood says, there is a difference between trespass and replevin in the rules of pleading. In some cases there is certainly a material difference in the pleading in the two actions, though in others they are the same. One of the cases in which they differ is, that if trespass be brought for taking cattle which were distrained damage feasant, it is sufficient for the defendant to say that he was possessed of the close,

and the cattle were doing damage: but in replevin the avowant must deduce a title to the close. Wherever there is a difference, it is in favour of trespass and against replevin: for in trespass an excuse in a plea is sufficient, but in an avowry a title must be shown *. This brings me to the question, Whether the plea on this record be good to a common intent? Now I think that the doctrine of certainty to a common intent will not support it. Certainty in pleading has been stated by Lord *Coke* (*a*) to be of three sorts, *viz.*, certainty to a common intent, to a certain intent in general, and to a certain intent in every particular. I remember to have heard Mr. Justice Aston treat these distinctions as a jargon of words, without meaning. They have, however, long been made, and ought not altogether to be departed from. Concerning the last two kinds of certainty, it is not necessary to say anything at present. But it should be remembered, that the certain intent in every particular applies only to the case of estoppels (*b*). By a *common intent* I understand, that when words are used *which will bear a natural sense,* and also *an artificial one,* or one to be made out by argument or inference, the *natural sense shall prevail:* it is simply a rule of *construction* and *not of addition:* common intent cannot add to a sentence words which are omitted. There is also another rule in pleading, which is, that if the meaning of words be equivocal, they shall be taken most strongly against the party pleading them. There can be no doubt that the passing and repassing on the highway was traversable; for the question, Whether the plaintiff was a trespasser or not? depends on the fact whether he was passing and repassing, and using the road as a highway, or whether his cattle were in the road as trespassers; and that which is the gist of the defence must necessarily be traversable. A most material point, therefore, is omitted, and I think the plea would be bad on a general demurrer. But here there is a special demurrer, and as the words are equivocal they are informal.

* See the note to *Meller* v. *Spateman*, 1 Wms. Saund. 346 e, and to *Poole* v. *Longueville*, 2 Wms. Saund. 284 d.

(*a*) Co. Litt. 303.

(*b*) Co. Litt. *ibid.*

Heath, J. The law is, as my brother Williams stated, that if cattle of one man escape into the land of another, it is no excuse that the fences were out of repair, if they were trespassers in the place from whence they came. If it be a close, the owner of the cattle must show an interest or a right to put them there. If it be a way, he must show that

he was lawfully using the way; for the property is in the owner of the soil, subject to an easement for the benefit of the public. On this plea it does not appear whether the cattle were passing and repassing, or whether they were trespassing on the highway; the words used are entirely equivocal.

Rooke, J. of the same opinion.

Judgment for the defendant.

THE subject of *certainty in pleading* having been adverted to in the note to *J'Anson* v. *Stuart*, *ante*, it is intended to append to this case a few remarks upon the other branch of law, with reference to which it is usually cited; namely, the respective rights of the public, and of the owners of the soil, over a common highway. The questions on which it is intended to touch are—

I. What is a highway.
II. How it originates.
III. How it may be lost.
IV. How it is to be kept in repair.

1. *Highway—What.*—A *highway* is a passage which is open to all the king's subjects. Mr. Wellbeloved defines it to be a *thoroughfare;* but there are still doubts whether a highway must necessarily have been originally a *thoroughfare;* and it seems, at all events, that if a highway were stopped at one end so as to cease to be a thoroughfare, it would in its altered state continue a highway; *per Patteson*, J., *Rex* v. *Marquis of Downshire*, 4 Ad. & Ell. 713. However, I have adopted the above definition as the safest; since, whether or no a passage, to be open to all the king's subjects, need be a thoroughfare, it is clear that every passage, which is open *de jure* to all the king's subjects, must be a *highway*. It may be a *foot-way*, appropriated to the sole use of pedestrians; a *pack and prime way*, which is both a horse and foot way, or a *cart way*, which comprehends the other two and also a cart or carriage way. Co. Litt. 56 a. But, to whichever of these classes it belong, it is still a *highway;* for "*highway* is the *genus* of all public ways, as well cart-horse as foot ways." *Per* Lord *Holt*. *Regina* v. *Saintliff*, 6 Mod. 255. See *Logan* v. *Burton*, 5 B. & C. 513; *Allen* v. *Ormond*, 8 East, 4; *R.* v. *Inhabs. of Salop*, 13 East, 95; *Domina Regina* v. *Cluworth*, Salk. 358. See, as to railroads, *R.* v. *Severn and Wye Railway Co.*, 2 B. & A. 646. Nay, even *public rivers*, are, in law, to be considered *highways*, since they fall within the definition above given, and are passages open to all the king's subjects. 1 Lord Raym., 725; 2 Lord Raym., 1174; *R.* v. *Hammond*, 10 Mod. 382; Com. Di. *Chimin.* A. 1; *Mayor of Lynn* v. *Turner*, Cowp., 86.

The interest of the public in a highway consisting solely in the right of passage, the soil and freehold over which that right of way is exercised, may be, and generally is, vested in a private owner, who may maintain an action against persons who infringe his rights therein, as, for instance, by permitting cattle to depasture there. See the principal case, and *Sir John Lade* v. *Shepherd*, 2 Str. 1004; *Stevens* v. *Whistler*, 11 East, 51. And the general *primâ facie* presumption of law is, that the freehold of the road, *usque ad medium filum viæ*, is in the proprietors of the land on either side. *Cooke* v. *Green*, 11 Price, 736; *Hedlam* v. *Headley*, Holt, 463, see however the exception stated by Lord *Denman*, *C. J. R. Hatfield*, 4 Ad. and Ell. 164, and per Lord *Tenterden*, C. J. in *R.* v. *Edmonton*, 1 M. & Rob. 124. And so of the waste land on each side of the road. *Steel* v. *Prickett*, 2 Stark. 463; *Doe* v. *Pearsey*, 7 B. & C. 304. Unless, indeed, it communicate with other larger wastes belonging to the lord of the manor. Anon Lofft, 358; *Grose* v. *West*, 7 Taunt. 39; *Doe* d. *Barrett* v. *Kemp*, 7 Bingh. 332.

The right of the public, however, is that which is of chief importance, and is principally to be taken care of. And therefore if a highway become so out of repair and founderous, as to be impassable, or even incommodious, the public have a right to go on the adjacent ground, whether it be cultivated or uncultivated; 1 Roll's Abr. 390 A. pl. 1 B. pl. 1; 1 Hawk. P. C. 76, s. 2; *Absor* v. *French*, *Taylor v. Whitehead*, Dougl. 749; 2 Show. 28, pl. 19; a privilege which the grantee of a private way can under no circumstances assume. *Pomfret* v. *Rycroft*, 1 Wms. Saund. 322 a, n. 3. *Taylor* v. *Whitehead*, *ubi supra*; *Bullard* v. *Harrison*, 4 M. & S. 387.

11. *As to the mode in which a Highway is created.*—Except where this is done by the express enactment of the Legislature, it derives its existence from a dedication to the public, by the owner of the land over which the highway extends, of a right of passage over it; and this dedication, though it be not made in express terms, as it indeed seldom is, may and will be presumed from an uninterrupted use by the public of the right of way claimed. *R.* v. *Lloyd*, 1 Camp. 260. See *British Museum* v. *Finnis*, 5 C. & P. 460.

"No particular time is necessary for evidence of a dedication. If the act of dedication be unequivocal, it may take place immediately. For instance, if a man build a double row of houses, opening into an ancient street at each end, making a street, and sells or lets the houses, that is *instantly* a highway." *Per Chambre* J., in *Woodyer* v. *Hadden*, 5 Taunt. 125.

Eight, and even six years, have been held time enough wherein to presume a dedication from user. *Trustees of Rugby Charity* v. *Merrywether*, 11 East, 375. Four years have been held too short a time. But all depends upon the special circumstances of each case, as will be understood from the remarks of *Chambre* J, above cited. *R.* v. *Hudson*, 2 Str. 909; *R.* v. *Wright*, 3 B. & Ad. 681.

A dedication cannot be presumed against the Crown. *Harper* v. *Charlesworth*, 4 B. & C. 574. As a dedication to the public will be presumed where circumstances warrant it, so that presumption may be rebutted, and prevented from arising, by circumstances incompatible with the supposition that any dedication has taken place. Thus, though we have seen that if a man open a useful passage from one public highway or street into another, a presumption will, in course of time, arise, that he has dedicated that passage to the public, yet, if he place a bar or gate across the road, which may be opened and shut at pleasure, the presumption of dedication is rebutted. Nay, though the bar or gate have been knocked down, the fact of its having once been there will, at least for a considerable time, prevent the presumption of a dedication from arising. *Roberts* v. *Karr*, 1 Camp. 262, *note*; *Lethbridge* v. *Winter*, 1 Camp. 263. See *British Museum* v. *Finnis*, 5 C. & P. 460.

A dedication to the public may be limited *in point of time* by acts contemporaneous with the dedication. *R.* v. *Hudson*, 2 Str. 909; *R.* v. *Northampton*, 2 M. & S. 262. See *R.* v. *Mellor*, 1 B. & Adol. 32. But whether a dedication can be partial *in its extent*, is a question of some doubt and difficulty. See it discussed by Mr. Wellbeloved, on Highways, p. 52, *et seq.* See also *Marquis of Stafford* v. *Coyney*, 7 B. & C. 257. *Rex* v. *Leake*, 2 Nev. & Mann, 595; 5 B. & Adol. 469. *Lethbridge* v. *Winter*, 1 Camp. 263.

It must also be observed, that the dedication of the owner of a particular estate will not bind those in remainder, or prevent them from stopping the way dedicated, when the estate comes into their possession. *Wood* v. *Veal*, 5 B. & A. 454. See *Baxter* v. *Taylor*, 1 Nev. & M. 13; *R.* v. *Edmonton*, 1 M. & Rob. 24. Unless, indeed, in the course of the period during which the way has been used, there have been a succession of tenants, or the landlord has had express notice of the user, in which cases his assent to it might be implied. *R.* v. *Barr*, 4 Camp. 16.

The assent of the parish through which the highway runs is not requisite to give effect to the dedication thereof, *R.* v. *Leake*, 5 B. & Adol. 469; though the contrary of this proposition was once contended for. *R.* v. *St. Benedict*, 4 B. & A. 447; *R.* v. *Mellor*, 1 B. & Adol. 32; *R.* v. *Cumberworth*, 3 B. & Adol. 112; *R.* v. *Wright*, 3 B. & Adol. 683. See now, however, on this subject, 5 & 6 Wm. IV. c. 50, sec. 23, cited *post*.

It has been already remarked, that a highway is sometimes created by an act of parliament passed for that purpose. The provisions of such an act must be strictly followed, or the creation will not take place. See *R.* v. *Haslingfield*, 2 M. & S. 558. Where an act of parliament directed a road from A. to B., it was held that the whole line must be complete, before any portion of it would become a highway repairable by the parish. *R.* v. *Cumberworth*, 3 B. & Ad. 112. and 4 Ad. & Ell. 731; *R.* v. *Edge Lane*, 4 Ad. & Ell. 723. It was thought in one case, that where the act directed a main road *with branches*, the main road would become a public road before the completion of the branches, *R.* v. *J. J., W. R. of Yorkshire*, 5 B. & Ad. 1003; but the act there contained the word *respectively;* and *R.* v. *Edge Lane* shows that, in the absence of special words, it is otherwise.

III. *As to the mode in which a Highway may be lost.*—The common law presents no means by which a public right of way can be lost absolutely. *Fuller* v. *Sanders*, Cro. Jac. 446. It might, however, be diverted from one line of road into another; and that either by the act of God—as if a navigable river change its course—or by proceedings on a writ entitled that of *ad quod damnum*, which is an original writ issuing out of Chancery, and directing the sheriff to summon a jury, to inquire whether the proposed diversion will be detrimental to the public, and to return the inquisition into Chancery, where any person injured thereby might have impeached it.

A public highway may, of course, be either extinguished or diverted by act of parliament; and statute 5 & 6 W. 4, c. 50, contains, from section 84 to 92, copious directions as to the mode in which it may be stopped up or diverted by two justices, those sections enact, that whenever the inhabitants, in vestry assembled, deem it expedient that a highway should be *stopped, diverted, or turned*, either entirely, or reserving a foot-way or bridle-way, the chairman shall, in writing, direct the surveyor to apply to two justices to view it, and authorise him to pay the expenses of the view. Any inhabitant may call upon the churchwardens to assemble a vestry for this purpose. If it appear to the two justices, upon their view, that the highway may beneficially be stopped, diverted, or turned, and the owner of the land through which the new highway (if any) is intended to be made, consent in writing, notices are to be affixed at each end of the road, published for four weeks running in a county newspaper, and for four successive Sundays on the door of the church of each parish through which the highway runs; and when proof has been made, to the satisfaction of the justices, of the publication of such notices, and a plan has been laid before them of the old and proposed new highways, the justices are to make their certificate, which is to be lodged with the clerk of the peace, and, at the quarter sessions next after four weeks from the day of its being so lodged, is to be read in open court, and enrolled, together with the proof, plan, and consent, among the records of the quarter sessions. The stoppage or diversion of several highways connected with each other, may be effected by the same order and certificate. Parties aggrieved by such certificate may appeal to the said quarter sessions, giving ten days' notice, and a statement of the grounds of appeal. The court of quarter sessions is to empanel a jury to try this appeal, to decide it according to the verdict, and to award costs to the successful party. If there be no appeal, or the appeal be dismissed, the quarter sessions are to make an order for the diversion or stopping the old highway, and purchasing the ground for the new one, which thenceforth is to be a public highway.

Besides the above enactment, the Turnpike Acts contain provisions applicable to that class of ways only.

IV. *As to the mode in which a Highway is to be repaired.*—At common law, the liability to repair all highways within a parish rests on the occupiers of the land therein. 1 Roll's Abr. 390; *Austin's* case, 1 Vent. 183, 9; *R.* v. *St. George, Hanover Sq.*, 3 Camp. 222; *R.* v. *Netherthong*, 2 B. & A. 179. Where a place happened to be extra-parochial, it seemed doubtful how the repair was to be enforced. *R.* v. *Kingsmoor*, 2 B. & C. 190. The liability of the parishioners may indeed be suspended, and the burden imposed on

other persons, under certain circumstances. But then, if those persons become in any way unable, or cease to be compellable, to perform the duty of reparation, the dormant liability of the parishioners revives. *Young* v. ——, 1 Lord Raym., 725; *R.* v. *Sheffield*, 2 T. R. 106; *R.* v. *Oxfordshire*, 4 B. & C. 194. Nor can the parish, by any agreement whatever, exonerate itself from this inherent liability. *R.* v. *Mayor of Liverpool*, 3 East, 86.

This common-law liability to repair all the highways situate within it, under which every parish lay, has now, however, been a good deal narrowed by statute 5 & 6 W. 4, cap. 50, so far as respects roads constructed by private individuals, after the passing of that act. The 23d section enacts that no road made by a private person or corporation, or set out as a private drift-way or horse-path by the award of enclosure commissioners, shall be deemed a highway repairable by the parish, unless three months' notice be given to the surveyor of the intention to dedicate, and unless it be substantially made, to his satisfaction, and that of two justices, who are to view and certify, and their certificate is to be enrolled at the next sessions. The surveyor, on receipt of the notice, is to call a vestry, and if they deem the new road not of sufficient utility, the question is to be determined by the next special session for the highways. Hence it appears that the sort of dedication which will suffice to entitle the public to a road, will, for the future, be different from that which must take place in order to burden the parish with the duty of repairing it. See *R.* v. *Leake*, 5 B. & Ad. 469; *R.* v. *Cumberworth*, 3 B. & Ad. 112; *R.* v. *Wright*, 3 B. & Ad. 683; *R.* v. *Mellor*, 1 B. & Ad. 32.

Special provisions have been made by the Legislature, respecting the repair of roads which happen to pass along the boundary line of two parishes, so as to have one side in one parish, and the other side in another parish. See 5 & 6 W. 4, c. 50, secs. 58, 59, 60, 61.

It has been said, that the common law liability to repair highways, may be imposed on other persons than the parishioners at large under certain circumstances. These are—

1. Where the owner of the land through which a highway passes, incloses, in which case he becomes liable to repair as much of it as he has inclosed; *Sir E. Duncombe's* case, Cro. Car. 366; the reason of this is, that the inclosure prevents the public from exercising their right, which has been before spoken of, *viz.* that of going on the adjacent land when the highway is impassable; and the repairs to which he is subjected are stricter than the liability even of the parish, for the parish is only obliged to keep the road in the same state that it has always been; whereas the person who has inclosed, is bound to maintain *a perfect good way*; and, if he do not, the public may justify making gaps in his inclosure, and going into his grounds as far as is necessary to avoid the bad way. *Henn's* case, Sir W. Jones, 296; see *R.* v. *Flecknow*, Burr. 461, and 3 Salk. 182. He may, however, get rid of his liability by destroying his inclosures. *R.* v. *Stoughton*, 2 Wms. Saund. 160, *note* 12. When there is an ancient inclosure on one side of a road, and the owner of the land on the other side incloses it, he shall maintain the whole way; *R.* v. *Stoughton*, 2 Wms. Saund. 161 *note*; if there be no such ancient inclosure, he shall only repair half the way; *R.* v. *Staughton*, 1 Sid. 464; where two inclose, they shall repair the way in moieties, *ibid.*; and see 1 Wms. Saund. 161, *in notis*.

2. The burthen of repair may be cast on a particular person by prescription; this prescription, if alleged against a corporation, may be general; but if alleged against an individual, some consideration for it must be shown, *ex. gr.*, the having lands holden by such service. 1 Hawk. P. C., c. 76, s. 8. See *R.* v. *Kerrison*, 1 M. & S. 435; 13 Rep. 33. Bac. Abr. Highway, *F. R.* v. *St. Giles*, 5 M. & S. 260. And when lands holden by such charge are conveyed to several, the charge is not apportioned among them, but each is liable to the whole repairs, and must have contribution from the others. *Regina* v. *Duchess of Buccleugh*, 1 Salk, 358; *R.* v. *Buckridge*, 4 Mod. 48; 3 Vin. Abr. Apportionment, 5, pl. 9.

If a road had been widened, the mode of doing which is now provided by 5 & 6

W. 4, c. 50, sec. 82, the parish must at common law have repaired the new part thereof. *R.* v. *West Riding Yorkshire*, 2 East, 353; st. 4, G. 4, c. 95, s. 68. But now when a road is widened, diverted, or turned, the parish must repair the whole: and means are provided for enforcing a rateable contribution from the persons previously liable to the reparation. 5 & 6 W. 4, c. 50, sec. 93.

By sec. 62 of the said act, a mode is chalked out of converting a highway, repairable by a corporation, or individual, into a parish highway, and fixing the compensation to be paid by the party to be relieved from the *onus* of repairing.

3. The inhabitants of a particular township within a parish, may, *by custom*, be bound to repair the highways lying within its own boundary. *R.* v. *Ecclesfield*, 1 B. & A. 348. In like manner, a parish may, by immemorial custom, be charged with the repair of a bridge instead of the county. *R.* v. *Hendon*, 4 B. & Adol. 628; but not with the repairs of a highway out of its own boundary. *R.* v. *St. Giles*, 5 M. & S. 260; *R.* v. *Machynlleth*, 2 B. & C. 166. By such a custom the township is placed on the same footing as a parish, with respect to the highways within it, whether new or old. *R.* v. *Hatfield*, 4 B. & A. 75. See 5 & 6 W. 4, cap. 50, sec. 5. See further as to highways, and particularly as to pleadings relating to them, the notes to *R.* v. *Staughton*, 2 Wms. Saund. 160; and as to bridges, see stats. 22 H. 8, cap. 5, 43 G. 3, cap. 59, sec. 5, and 5 and 6 W. 4, cap. 50, secs. 21 & 22.

ELWES *v.* MAWE.

MICH. 43 *G.* 3.—*K. B.*

[REPORTED 3 EAST, 38.]

A tenant in agriculture, who erected, at his own expense, and for the mere necessary and convenient occupation of his farm, a beast-house, carpenter's shop, fuel-house, cart-house, pump-house, and fold-yard wall, which buildings were of brick and mortar, and tiled, and let into the ground, cannot remove the same, though during his term, and though he thereby left the premises in the same state as when he entered. There appears to be a distinction between annexations to the freehold of that nature for the purposes of trade, and those made for the purposes of agriculture and better enjoying the immediate profits of the land, in favour of the tenant's right to remove the former: that is, where the superincumbent building is erected as a mere accessary to a personal chattel, as an engine; but where it is accessary to the realty, it can in no case be removed.

THE declaration stated that the plaintiff was seised in fee of a certain messuage, with the out-houses, &c. and certain land, &c. in the parish of Bigby, in the county of Lincoln, which premises were in the tenure and occupation of the defendant as tenant thereof to the plaintiff, at a certain yearly rent, the reversion belonging to the plaintiff; and that the defendant wrongfully, &c. intending to injure the plaintiff in his hereditary estate in the premises, whilst the defendant was possessed thereof, wrongfully and injuriously, and without the license and against the will of the plaintiff, pulled down divers buildings, parcel of the said premises, in his, the defendant's, tenure and occupation, *viz. a beast-house, a carpenter's shop, a waggon-house, a fuel-house* and a *pigeon-house* and a *brick wall*, enclosing the fold-yard, and took and carried away the materials, which

were the property of the plaintiff, as landlord, and converted them to his, the defendant's own use; by reason whereof the reversionary estate of the plaintiff in the premises was greatly injured, &c. The defendant pleaded the general issue. And at the trial at the last Lincoln assizes a verdict was found for the plaintiff, with 60*l.* damages, subject to the opinion of the court on the following case:

The defendant occupied a farm, consisting of a messuage, cottages, barn, stables, out-houses, and lands, at Bigby, in the county of Lincoln, under a lease from the plaintiff for twenty-one years, commencing on the 12th day of May 1779; which lease contained a covenant on the part of the tenant to keep and deliver up in repair the said *messuage, barn, stables, and out-houses*, and other buildings belonging to the said *demised premises*. About fifteen years before the expiration of the lease the defendant erected upon the said farm at his own expense a substantial *beast-house, a carpenter's shop, a fuel-house, a cart-house* and *pump-house*, and fold-yard. The buildings were of brick and mortar, and tiled, and the foundations of them were about one foot and a half deep in the ground. The carpenter's shop was closed in, and the other buildings were open to the front, and supported by brick pillars. The fold-yard wall was of brick and mortar, and its foundation was in the ground. The defendant, previous to the expiration of his lease, pulled down the erections, dug up the foundations, and carried away the materials, leaving the premises in the same state as when he entered upon them. These erections *were necessary and convenient for the occupation of the farm*, which could not be well managed without them. The question for the opinion of the Court was, Whether the defendant had a right to take away these erections. If he had, then a verdict to be entered for the defendant; if not, the verdict for the plaintiff to stand.

This case was first argued in Easter term last by *Torkington* for the plaintiff, and *Clarke* for the defendant; and again in this term by *Vaughan*, Sergt. for the plaintiff, and *Balguy* for the defendant.

For the plaintiff it was argued that the removing the buildings in question was waste at common law, and that this case did not fall within any of the exceptions, which

had been introduced *solely for the benefit of trade* in relaxation of the old rule. That rule was, that whatever was once annexed to the freehold could never be severed again without the consent of the owner of the inheritance. Accordingly, glass windows, wainscot, benches, doors, furnaces, &c., though annexed by tenant for years for his own accommodation, could not be removed by him again. Co. Litt. 53 *a*. The principle on which this was founded was the injury which would thereby arise to the inheritance from disfiguring the walls of the mansion: though some of these things were in their nature personal chattels, supplying the place of mere movable utensils and furniture. But it never was questioned but that buildings let into the soil became part of the freehold from the very nature of the thing. This was decided so long ago as Hil. 17 Ed. 2, 518, in a writ of waste against a lessee, who had built a house and pulled it down during his term. And Co. Litt. 53 *a*, which is to the same purpose, goes further and says, that even the building of such new house by the tenant is waste; but that is denied in *Lord Darcy* v. *Askwith* (*a*); though that also agrees that the letting down of such new house built by the tenant himself would be waste. So taking down a stone wall, or a partition between two chambers, is waste. 10 Hen. 7, 2 pl. 3. It does not, indeed, appear by that book, whether those erections had been before made by the tenant himself; but they were so taken to be by *Meade* J. in *Cooke* v. *Humphrey* (*b*). All this is confirmed by Lord *Coke* at the end of *Herlakenden's* case (*c*), where it is said to have been adjudged in *C. B.* that glass fastened to the windows, or wainscot to the house, by the lessee, cannot be removed by him: and that it makes no difference in law whether the fastening of the latter be by great or little nails, screws, or irons put through the posts or walls (as had been then of late invented), or in whatever other manner it was fastened to the posts or walls of the house. In all these cases the rule as between landlord and tenant seems to have followed that between heir and executor, founded upon the reason first mentioned: and no innovation upon the strict rule seems ever to have been admitted, except in the case before Lord C. B. *Comyns*, (*d*), at Nisi Prius, of the cyder mill, which he held should go to the executor, and not to

(*a*) Hob. 234.

(*b*) Moor, 177.

(*c*) 4 Rep. 63, 4.

(*d*) Cited in *Lawton* v. *Lawton*, 3 Atk. 13. 16.

the heir; but upon what particular grounds does not appear: and the case of *Culling* v. *Tufnal* (*a*), before Lord Ch. J. *Treby*, at Hereford, in 1694, where a barn erected by a tenant upon pattens and blocks of timber, lying *on* but *not* let *into* the ground, was holden to be removable by the tenant: but even there he relied on the *custom of the country* in favour of the tenant, with reference to which it might be presumed that he and his landlord had contracted.* The only established exception (which the plaintiff's counsel admitted was as old as the rule itself), is in favour of trade, with respect to articles annexed to the freehold for the purpose of carrying on trade and manufactures. In 20 *Hen.* 7, *fo.* 13, *pl.* 24, an heir brought trespass against executors for taking away a furnace fixed to the freehold with mortar, and the taking was holden tortious. But it was there said "that if a lessee for years set up such a furnace for his own advantage, or a dyer his vats and vessels to carry on his business (*b*), during the term he may remove them: but if he suffer them to be fixed to the land after the end of the term, then they belong to the lessor; and so of a baker." Then follows, "It is no waste to remove such things within the term by any." But this is said to have been against the opinions before mentioned, and to have been doubted in the 42 Ed. 3, p. 6, pl. 19, whether it were waste or not. It is clear, therefore, from the whole of the passage, that the only generally admitted exception was in favour of traders, which is shown by the examples of the dyer and baker affixing vessels *pur occupier son occupations*: and that at least it was doubtful whether the same privilege extended to others affixing to the freehold similar articles. And the exception is the more remarkable because at that early period agriculture must have been of much greater importance to the state than trade. This distinction was continued in later times. In *Poole*'s case (*c*), M. 2 Ann. in an action on the case by a lessee against the sheriff of Middlesex, who had taken in execution the vats, coppers, tables, partitions, and pavement, &c. of an under lessee, a soap-boiler, which he had put up as fixtures for the convenience of his trade, Lord C. J. *Holt* held that during the term the soap-boiler might well remove the vats set up in relation to trade, by the common law; but that there was a difference between what he

(*a*) Bull, N. P. 34.

(*) See *Wigglesworth* v. *Dallison*, *ante*, vol. i. *et notas*.

(*b*) The words in the original are "*pur occupier son occupation*."

(*c*) Salk. 368.

did to carry on his trade, and what he did to complete the house; as hearths, and chimney-pieces; which he held not removeable. The next case was *Cave* v. *Cave* (*a*), in 1705, where the Lord Keeper held that not only wainscot, but pictures and glasses put up in the place of wainscot, should go to the heir and not to the executor, to prevent the house being disfigured. Then followed *Lawton* v. *Lawton* (*b*); where it was decreed by Lord *Hardwicke* C. that a fire engine erected for the benefit of a colliery by the tenant for life should be considered as personal estate, and go to his executor, and not to the remainderman, in favour of creditors. But there it was proved to be *customary* to move such an engine; that in building the shed for its security *holes were left* for the ends of the timber *to make it more commodious for removal;* and that it was very capable of being removed. The evidence relied on by the other side was that it could not be removed without tearing up the *soil* and destroying the *brick-work.* But Lord *Hardwicke* considered the brick-work there as a mere *accessory* to the engine, which in its own nature was a mere personal moveable chattel. One reason, he said, which weighed with him was, that it was a *mixed* case, between enjoying the profits of the land and carrying on *a species of trade;* and considering it *in that light*, it came near the instances of furnaces and coppers in brewhouses. That decision was in 1743. In ex parte *Quincy* (*c*), in 1750, where the principal question was, whether the *utensils* of a brew-house passed by a mortgage of the brew-house with the *appurtenances;* it is said that a tenant may, during the term, take away *chimney pieces*, and even *wainscot;* but the latter is observed to be a very strong case. The same was before said in *Lawton* v. *Lawton*, with this difference, that it was there said of wainscot *fixed only by screws*, and of *marble* chimney-pieces. This opinion may have proceeded as it did in *Beck* v. *Rebow* (*d*), upon the consideration that matters of this sort were merely *ornamental furniture*, and not necessary to the enjoyment of the freehold. The case of Lord *Dudley* v. Lord *Ward* (*e*), in 1750, was like that of *Lawton* v. *Lawton*, on the authority of which it was decided. There Lord *Hardwicke* recognized the general rule, with the single exception as between landlord and tenant, that fixtures annexed by the latter *for*

(*a*) 2 Vern. 508.

(*b*) 3 Atk. 13.

(*c*) 1 Atk. 477.

(*d*) 1 P. Wms. 91.

(*e*) Ambl. 113, and Bull. N. P. 34.

the sake of trade might be removed. There too the fire-engine was considered as the *principal*, and the building erected over to preserve it, as the mere *accessory:* and the colliery itself as in part the carrying on of *a trade.* In *Lawton* v. *Salmon*, E. 22 Geo. 3, B. R. (*a*), *salt pans* were holden to go to the heir and not to the executor: and though Lord *Mansfield* said that the rule had been relaxed as between landlord and tenant, tenant for life and remainderman, in respect of things put up by the tenant in possession; still he confined the relaxation to things so affixed *for the benefit of trade.* And he there alluded to the case of the cyder mill (doubtingly) as standing alone, and not printed at large. Then the case of *Dean* v. *Allalley* (*b*), sittings after Easter, 39 Geo. 3, was a case where two sheds, called *Dutch barns,* which had been erected by the tenant during his term, were removed by him: and being sued on his covenant, by which he undertook to leave all buildings which then were or *should be erected* on the premises during the term in repair, Lord *Kenyon,* at Nisi Prius, held that buildings of that description were not included; and said that the law would make the most favourable construction for the tenant where he had made necessary and useful erections *for the benefit of his trade or manufacture.* Of what precise description the buildings there were does not appear; possibly not affixed to the ground (*c*), at least not such parts as were removed. If not, the case amounts to no more than that of *Penton* v. *Robart* (*d*), where a *varnish house* of wood, which had been erected on a brick foundation by the tenant, *for the purpose of carrying on his trade,* was removed by him. But it did not appear there that the *foundation* was removed, but only the *superstructure of wood,* which had been *brought by the tenant from another place,* where he had before carried on his business. Lord *Kenyon,* indeed, there laid stress on the instances of gardeners and nurserymen in the neighbourhood of the metropolis erecting green-houses, &c., which he considered that they would be at liberty to remove. Whether that be done under particular agreements or not does not appear: but supposing the law would imply an exception in favour of tenants of that description, it would only be upon the ground of considering them as carrying on a species of trade: the very

(*a*) Cited in a note to *Fitzherbert* v. *Shaw*, 1 H. Blac. 259. The principal case turned on a particular agreement.

(*b*) 3 Espin. Ni. Pri. Cas. 11.

(*c*) *Vide post.* what account was given of this case in the arguments of the defendant's counsel.

(*d*) 2 East, 88.

nature of their occupation and of the letting being to enable them to disannex even trees from the land (*a*). But none of the cases have gone the length now contended for; and the very grounds on which exceptions have been made from the general rule preclude the present case. Erections of this sort are not in their nature temporary nor moveable, but are calculated solely for the enjoyment of the land: the expense of erecting them is great, and their value is great on the spot, but of trifling consideration when removed: the injury of their removal, therefore, is much greater to the landlord than the benefit of the materials when removed is to the tenant. If the exception were extended to buildings erected for the purposes of agriculture, it would be as extensive as the rule itself, and would therefore destroy it. The sole object of such erections is for the purpose of enjoying the produce of the land; the *land*, therefore, is the principal, and the buildings the *accessory to the land*. This distinguishes it essentially from buildings erected for engines or machinery used in trade, where the *personal chattel* is the principal. No other line than this can be drawn without overthrowing all the authorities.

(*a*) *Lawrence*, J., on the first argument intimated, that if ground were let expressly for *nursery* ground, it might be considered as implied in the terms of the contract, that it was to be used for taking up young trees, &c., as is usual in such cases. But he expressed a wish to be informed of the usual terms of the leases under which such grounds were holden in the neighbourhood of the metropolis.

For the defendant it was contended that the old rule of law had been gradually relaxed between landlord and tenant, though not so much between tenant for life and remainderman, or between heir and executor. The object has been to encourage tenants to lay out their money in the improvement of the premises, and in making their industry as productive as possible, which is for the benefit of the state as well as the individuals, and applies at least as strongly to tenants in husbandry as in trade. Agriculture, in the improved state in which it is now carried on, is in itself a trade; it requires a much larger capital than formerly, and the use of more expensive implements and machinery. Without the aid of modern improvements, the land cannot be made so productive as it otherwise may be, nor the produce so well preserved and brought to market. But unless the tenant is entitled to take away with him at the end of his term, or have a compensation in value for buildings like these in question erected in such a manner as to be capable of being removed at pleasure and set up on any other farm, he will not be at the expense of erecting them at all: and therefore though he, and through him the pub-

lic, will suffer, yet the landlord will not be the better for the right which he now claims. This is no question whether permanent additions or improvements made by a tenant to the old dwelling-house or out-buildings, or even new ones of that sort erected by him for his personal accommodation, are to be removed at the end of the term; for not even persons renting premises for the purpose of carrying on trades have any such privilege: but whether buildings so erected for the sole purpose and convenience of carrying on the farm, that is, of turning to the best account the capital and industry of the farmer in his trade or business, may not be removed by him. The materials of which the buildings are composed cannot vary the law, but the objects and interests of the persons concerned. If in the case of *Dean* v. *Allalley* (*a*), the tenant was entitled to remove the buildings called *Dutch barns*, the same rule will apply to the buildings in question, which are as much calculated for removal. For in that case (as appears from the MS. note of one of the counsel in the cause), the sheds erected "had a foundation of brick in the ground, and uprights fixed in and rising from the brickwork, and supporting the roof, which was composed of tiles, and the sides open," as in the present case. If the exception be confined to erections for the benefit of trade, Lord *Kenyon* in that case considered the *Dutch* barns as coming within that description. This is consonant to the opinion delivered by the same learned Judge in *Penton* v. *Robart* (*b*). It is true that was the case of a *varnish house;* but it is clear that his lordship's opinion was founded on the extension of the exception in the case of landlord and tenant generally; for the instances put by him in illustration of his opinion, are cases of gardeners and nurserymen, whose profits are derived out of the immediate produce of the land: and the buildings now in question are no more annexed to the soil than the varnish house there was, which was on a foundation of brick, or than the hothouses and greenhouses of the persons alluded to. But the argument does not rest alone on very modern cases, but is strongly supported by the decisions of Lord Hardwicke in the cases of *Lawton* v. *Lawton* (*c*), and *Lord Dudley* v. *Lord Ward* (*d*). There, even as between tenants for life or in tail and the remaindermen, the executors of the former were holden entitled to the fire engines of collieries: build-

(*a*) 3 Espin. Ni. Pri. Cas. 11, and MS.

(*b*) 2 East. 88.

(*c*) 3 Atk. 13.

(*d*) Ambl. 113.

ings which must in their very nature be annexed to the soil, and without which the profits of the land, *viz.* the coal, could not be taken. Those were, indeed, said to be *mixed* cases between taking the profit of land and carrying on a trade; but wherefore mixed does not so plainly appear. So the case of the cyder mill is directly in point: that is as essential to the enjoyment of the land in that particular species of produce out of which the cyder is to be made, as barns and other buildings are to the enjoyment of arable, or beast-houses of pasture land. That case was much stronger than what is now contended for; the question arising there between the heir and executor, where it may be admitted that the old rule has prevailed much stricter. All the cases therefore in the books between persons standing in that relation may well be laid out of the question, as they turn upon the presumed intention of the ancestor or testator in favour of the heir, that the inheritance should descend to him entire and undefaced. But the case of *Culling* v. *Tufnal* (*a*), before Lord Ch. J. *Treby*, which is in point, was between landlord and tenant. That was the case of a *barn* removed by the tenant: and though the foundations were not dug into the ground, yet its very weight must have sunk it in some measure below the surface of the soil. It is true that case was put by him on the ground of the custom of the country; but *Buller* J., in citing it, observes that now, without any custom, it would be determined in favour of the tenant without any difficulty; for that the old rule had been relaxed as between landlord and tenant, &c., though still preserved as between heir and executor. No distinction is there hinted at between trade and agriculture. In *Fitzherbert* v. *Shaw* (*b*), the question, it is true, turned at last on the agreement; but *Gould* J. was decidedly of opinion at the trial, that if the tenant had removed the buildings during the term, he would have been justified in so doing; and there some of the things removed were a shed *built on brick-work*, and some *posts* and *rails* erected by the tenant, all which must have been let into the ground, and were adapted to purposes of agriculture. Upon the whole they contended that the only line to be drawn from all the books was, that whatever buildings were erected by a tenant (be the materials what they may, or however placed in or upon the ground), for the immediate purposes of his trade, or for

(*a*) Bull. N. P. 34.

(*b*) 1 H. Blac 258.

the more advantageous taking or improving the profits of his farm, he may remove them again, provided he leave the premises on his quitting as he found them. According to this rule no injury could ensue to the landlord, whose property would, on the contrary, be eventually benefited by the better cultivation of it, while the public would derive an immediate advantage from the encouragement afforded to the capital and industry of the tenant.

Cur. adv. vult.

Lord *Ellenborough*, C. J. now delivered the opinion of the court. This was an action upon the case in the nature of waste by a landlord, the reversioner in fee, against his late tenant, who had held under a term for twenty-one years a farm consisting of a messuage and lands, outhouses, and barns, &c. thereto belonging, and who, as the case reserved stated, during the term and about fifteen years before its expiration, erected at his own expense a *beast-house*, a *carpenter's shop*, a *fuel-house*, a *cart-house*, a *pump-house*, and fold-yard. The buildings were of brick and mortar, and tiled, *and the foundations* of them were about a foot and half deep in the ground. *The carpenter's shop* was closed in, and the other buildings were open to the front and *supported by brick* pillars. The *fold-yard wall was of brick and mortar, and its foundation was in the ground.* The defendant, previous to the expiration of his lease, pulled down the erections, dug up the foundations, and carried away the materials; *leaving the premises in the same state as when he entered upon them.* The case further stated, that these erections were *necessary and convenient for the occupation of the farm*, which could not be well managed without them. And the question for the opinion of the Court was, Whether the defendant had a right to take away these erections? Upon a full consideration of all the cases cited upon this and the former argument, which are indeed nearly all that the books afford materially relative to the subject, we are all of opinion that the defendant had not a right to take away these erections.

Questions respecting the right to what are ordinarily called fixtures, principally arise between three classes of persons. 1st, Between different descriptions of representatives of the same owner of the inheritance; *viz.* between

his *heir* and *executor*. In this first case, i. e. as between heir and executor, the rule obtains with the most rigour in favour of the inheritance, and against the right to disannex therefrom, and to consider as a personal chattel, anything which has been affixed thereto. 2dly, Between the *executors of tenant for life or in tail*, and *the remainderman or reversioner;* in which case the right to fixtures is considered more favourably for executors than in the preceding case between heir and executor. The 3rd case, and that in which the greatest latitude and indulgence has always been allowed in favour of the claim to having any particular articles considered as personal chattels as against the claimant in respect of freehold or inheritance, is the case between landlord and tenant.

But the *general rule* on this subject is that which obtains in the first-mentioned case, i. e. between heir and executor; and that rule (as found in the year book 17 *E.* 2, *p.* 518, and laid down at the close of *Herlakenden's* case, 4 Co. 64, in Co. Litt. 53, in *Cooke* v. *Humphrey Moore*, 177, and in *Lord Darby* v. *Asquith*, Hob. 234, in the part cited by my brother *Vaughan*, and in other cases) ; is that where a lessee, having *annexed* anything to the freehold during his term, afterwards takes it away, it is waste. But this rule at a very early period had several exceptions attempted to be engrafted upon it, and which were at last effectually engrafted upon it, in favour of trade and of those vessels and utensils which are immediately subservient to the purposes of trade. In the Year Book, 42 Edw. 3, 6, the right of the tenant to remove a furnace erected by him during his term is doubted and adjourned. In the Year Book of the 20 Hen. 7, 13 *a & b*, which was the case of trespass against executors for removing a furnace fixed with mortar by their testator and annexed to the freehold, and which was holden to be wrongfully done, it is laid down, that "if a lessee for years make a furnace for his advantage, or a dyer make his vats or vessels *to occupy his occupation during his term*, he may *remove* them: but if *he suffer them to be fixed to the earth after the term, then they belong to the lessor.* And so of a baker. And it is not waste to remove such things within the term by some: and this shall be against the opinions aforesaid." But the rule in this extent in favour of tenants is doubted afterwards in 21 Hen. 7. 27,

and narrowed there, by allowing that the lessee for years could only remove, within the term, things *fixed to the ground*, and *not to the walls* of the principal building. However in process of time the rule in favour of the right in the tenant to remove *utensils set up in relation to trade* became fully established: and accordingly, we find Lord *Holt*, in *Poole's* case, Salk. 368, laying down (in the instance of a soap-boiler, an under-tenant, whose vats, coppers, &c. fixed had been taken in execution, and on which account the first lessee had brought an action against the sheriff), that *during the term the soap-boiler might well remove the vats he set up in relation to trade;* and that he might do it by the common law, and not by virtue of any special custom, *in favour of trade, and to encourage industry;* but that after the term they became a gift in law to him in reversion, and were not removable. He adds, that there was a difference between what the soap-boiler did *to carry on his trade*, and what he did to complete *his house*, as *hearths and chimney-pieces*, which he held not removable. The indulgence in favour of the tenant for years during the term has been since carried still further, and he has been allowed to carry away matters of ornament, as ornamental marble chimney-pieces, pier-glasses, hangings, wainscot fixed only by screws, and the like. *Beck* v. *Rebow*, 1 P. Wms. 94. *Ex parte Quincey*, 1 Atk. 477, and *Lawton* v. *Lawton*, 3 Atk. 13. But no adjudged case has yet gone the length of establishing that buildings subservient to purposes of agriculture, as distinguished from those of trade, have been removable by an executor of tenant for life, nor by the tenant himself who built them during his term.

In deciding whether a particular fixed instrument, machine, or even building should be considered as removable by the executor, as between him and the heir, the Court, in the three principal cases on this subject (*viz. Lawton* v. *Lawton*, 3 Atk. 13, which was the case of *a fire engine to work a colliery erected by tenant for life: Lord Dudley* v. *Lord Ward*, Ambler 113, which was also the case of a *fire-engine to work a colliery* erected by tenant for life: (these two cases before Lord *Hardwicke*): and *Lawton, executor*, v. *Salmon*, E. 22 G. 3. 1 H. Blac. 259, *in notis*, before Lord *Mansfield;* which was the case of *salt pans*, and which came on in the shape of an action of trover brought for the salt

pans by the executor against the tenant of the heir at law) may be considered as having decided mainly on this ground, that where the fixed instrument, engine, or utensil, (and the building covering the same falls within the same principle), was an accessory to a matter of a personal nature, that it should be itself considered as personalty. The fire-engine, in the cases in 3 Atk. and Ambler, was an accessory to the carrying on the trade of getting and vending coals; a matter of a personal nature. Lord *Hardwicke* says in the case in Ambler, "A colliery is not only an enjoyment of the estate, *but in part carrying on a trade.*" And in the case in 3 Atk. he says, "One reason that weighs with me is its being a *mixed* case, between enjoying the profits of the lands, and carrying on *a species of trade;* and considering it in *this light*, it comes very near the instances in *brewhouses, &c., of furnaces and coppers.*" Upon the same principle, Lord C. B. *Comyns* may be considered as having decided the case of the *cyder mill, i. e.* as a *mixed case* between enjoying *the profits of the land* and carrying on *a species of trade;* and as considering the cyder mill as properly an accessory to the trade of making cyder.

In the case of the salt pans, Lord *Mansfield* does not seem to have considered them as accessory to the carrying on a trade; but as merely the means of enjoying the benefit of the inheritance. He says, "*the salt spring is a valuable inheritance*, but no profit arises from it unless there be a salt work; which consists of a building, &c., for the purpose of containing the pans, &c., which are fixed to the ground. *The inheritance cannot be enjoyed without them. They are accessories necessary to the enjoyment of the principal. The owner erected them for the benefit of the inheritance.*" Upon this principle he considered them as belonging to the heir, as parcel of the inheritance, for the enjoyment of which they were made, and not as belonging to the executor, as the means or instrument of carrying on a trade. If, however, he had even considered them as belonging to the executor, as utensils of trade, or as being removable by the tenant, on the ground of their being such utensils of trade; still it would not have affected the question now before the Court, which is the right of a *tenant for mere agricultural purposes* to remove buildings fixed to the freehold, which were constructed by him for the ordinary pur-

poses of husbandry, and connected with no description of trade whatsoever: and to which description of buildings no case (except the Nisi Prius case of *Dean* v. *Allalley*, before Lord *Kenyon*, and which did not undergo the subsequent review of himself and the rest of the Court), has yet extended the indulgence allowed to tenants in respect to buildings for the purposes of trade. In the case in Buller's Nisi Prius, 34, of *Culling* v. *Tuffnell*, before Lord Ch. J. *Treby*, at Nisi Prius, he is stated to have holden that the tenant who had erected a *barn* upon the premises, and put it *upon pattens and blocks of timber lying upon the ground*, but *not fixed in* or *to the ground*, might by the custom of the country take them away at the end of his term. To be sure he might, and that without any custom; for the terms of the statement exclude them from being considered as *fixtures*: "they were not *fixed in or to the ground*." In the case of *Fitzherbert* v. *Shaw*, 1 H. Black 258, we have only the opinion of a very learned Judge, indeed, Mr. Justice *Gould*, of what *would have been* the right of the tenant, as to the taking away *a shed built on brick-work*, and some *posts* and *rails* which he had erected, if the tenant had done so during the term: but as the term was put an end to by a new contract, the question what the tenant could have done in virtue of his right under the old term, if it had continued, could never have come judicially before him at Nisi Prius: and when that question was offered to be argued in the Court above, the counsel were stopped, as the question was excluded by the new agreement. As to the case of *Penton* v. *Robart*, 2 East 88, it was the case of a *varnish house*, with a brick foundation let into the ground, of which the *woodwork had been removed from another place*, where the defendant had carried on his trade with it. It was *a building for the purpose of trade*; and the tenant was entitled to the same indulgence in that case, which, in the cases already considered, had been allowed to other buildings for the purposes of trade; as furnaces, vats, coppers, engines, and the like. And though Lord *Kenyon*, after putting the case upon the ground of the leaning which obtains in modern times in favour of the *interests of trade*, upon which ground it might be properly supported, goes further, and extends the indulgence of the law to the erection of greenhouses and hothouses by nurserymen, and, indeed, by implication, to

buildings by all other tenants of land; there certainly exists no decided case, and, I believe, no recognised opinion or practice on either side of Westminster Hall, to warrant such an extension. The Nisi Prius case of *Dean* v. *Allaly*, (reported in Mr. *Woodfall's* book, p. 207, and Mr. *Espinasse's*, 2 vol. 11), is a case of the erection and removal by the tenant of two *sheds* called *Dutch barns*, which were, I will assume, unquestionably fixtures. Lord *Kenyon* says, "the law will make the most favourable construction for the tenant, where he has made necessary and useful *erections* for *the benefit of his trade* or *manufacture*, and which enable him to carry it on with more advantage. It has been so holden in the case of cider mills, and other cases; and I shall not narrow the law, but hold erections of this sort *made for the benefit of trade*, or *constructed as the present*, to be removable at the end of the term." Lord *Kenyon* here uniformly mentions *the benefit of trade*, as if it were a building subservient to some purposes of trade; and never mentions agriculture, for the purposes of which it was erected. He certainly seems, however, to have thought that buildings erected by tenants for the purposes of farming, were, or rather *ought to be*, governed by the same rules which had been so long judicially holden to apply in the case of buildings for the purposes of trade. But the case of buildings for trade has been always *put and recognised as a known, allowed, exception* from the general rule, which obtains as to other buildings; and the circumstance of its being so treated and considered establishes the existence of the general rule to which it is considered as an exception. To hold otherwise, and to extend the rule in favour of tenants in the latitude contended for by the defendant, would be, as appears to me, to introduce a dangerous innovation into the relative state of rights and interests holden to subsist between landlords and tenants. But its danger or probable mischief is not so properly a consideration for a court of law, as whether the adoption of such a doctrine would be an innovation *at all:* and, being of opinion that it would be so, and contrary to the uniform current of legal authorities on the subject, we feel ourselves, in conformity to and in support of those authorities, obliged to pronounce that the defendant had no right to take away the erections stated and described in this case. *Postea to the plaintiff.*

The word *fixture*, it has been remarked by a learned author, is used by different writers to express different meanings. In *Hallen* v. *Runder*, 1 C. M. & R. 276, the court said, that "the word fixtures has acquired the peculiar meaning of chattels which have been annexed to the freehold, but which are removeable at the will of the person who annexed them." And the court, in that case, thought that neither were they *goods*, properly speaking, nor did a sale of them transfer any interest in lands within the meaning of the fourth section of the Statute of Frauds. It seems difficult, however, to use the term "fixtures" invariably in the above sense without producing some confusion; for if such be the universal meaning of the word, the same things would be *fixtures*, as between some persons, and not fixtures as between others. It seems better, therefore, for the purposes of this note, to use the word "*fixture*" in that which appears to be its natural and most obvious sense, *viz.*, *any thing annexed to the freehold*. By the expression *annexed to the freehold*, is meant fastened to, or connected with, it: mere juxta-position, or the laying of an object, however heavy, on the freehold, does not amount to *annexation*. Thus in the case cited in the text from *Buller's Nisi Prius*, 34, of *Culling* v. *Tuffnell*, where a tenant had erected a barn *on pattens and blocks of timber lying on the ground, but not fixed in or to the ground*; it was held that he might take them away at the end of his term. This was said in *Buller* to have been by the custom of the county; but the Lord *C. J.* remarks in the text, "To be sure he might, and that without any custom;" *for the terms of the statement exclude them from being considered as fixtures. They were not fixed in, or to, the ground.* See *Anthony* v. *Haneys and Harding*, 8 Bingh. 186; *Horn* v. *Baker*, 9 East, 215; *Davis* v. *Jones*, 2 B. & A. 165. There are indeed some cases of what is called *constructive annexation*, *i. e.*, cases in which an object, really a chattel, is, for certain purposes, considered annexed to the freehold. Thus in *Liford's* case, 11 Co. 50, we find the law laid down as follows:—"It is resolved in 14 H. 8, 25 b, in *Wistow's* case, that if a man has a horse-mill, and the miller takes the mill-stone out of the mill, to the intent to pick it to grind the better, although it is actually severed from the mill, yet it remains parcel of the mill as if it had always been lying upon the other stone, and, by consequence by lease, or conveyance of the mill, shall pass with it. So too of doors, windows, rings, &c. The same law of keys, though they are distinct things, they shall pass with the house." Such too are heir-looms; see 11 Vin. Abr. 167; *Lord Petre* v. *Heneage*, 12 Mod. 520; 1 L. Raym. 728; *Pusey* v. *Pusey*, 1 Vern. 273; charters, and evidences attendant on the inheritance, (see *Lord* v. *Wardle*, 3 Bingh. N. C. 680,) and the deer and fish in a man's park or fish-pond. See *Liford's* case, *ubi supra*, Shep. Touch. 470. Yet in these cases of constructive annexation, the articles constructively annexed do not acquire *all* the incidents of realty; for instance, trover may be brought for them like other chattels. Yet it is laid down by Lord *Coke*, that "if a man be seised of a house, and possessed of divers heirlooms, that by custom have gone with the house, and by his will deviseth away the heirlooms, this devise is void." Co. Litt. 185 b.; see 2 Woodeson's Lec. 380; Com. Di. Biens H.; Hargrave's note, Co. Litt. 18 b.; 1 P. Wms. 730; for the custom vests the property in the heir instantly, on the testator's death, whereas the will has no effect till the first moment afterwards.

Setting these cases of constructive annexation, which are comparatively unimportant, and on which few practical questions arise, completely out of view; the general rule is, that to constitute an article *a fixture*, *i. e.* part of the realty, it must be actually annexed thereto; and, *e converso*, whatever is so annexed becomes part of the realty, and the person who was the owner of it when a chattel loses his property in it, which immediately vests in the owner of the soil. *Quicquid plantatur solo solo cedit.* See Co. Litt. 53 a; and the judgment of *Parke*, B., in *Minshull* v. *Lloyd*, 2 Mee. and Welsb. 459. This is the general rule; but there are cases in which things annexed to the freehold, may be disannexed and carried away by some person claiming a property in them as against the owner of the freehold. It is as a leading authority on

questions of this sort that the case reported in the text is chiefly celebrated.

Lord *Ellenborough,* as will have been seen, divides these questions into three classes.

1. Between heir and executor.

2. Between executor and remainderman, or reversioner.

3. Between landlord and tenant.

We will consider these, and one or two others not noticed in the text, beginning with the most extensive class, *viz.* that of questions arising *between landlord and tenant.*

The general rule governing this subject is, that the tenant, if he have affixed anything to the freehold during his term, cannot again remove it without the consent of his landlord. Co. Litt. 53 a. But, inasmuch as a tenant for years was not punishable for waste, before the statute of Gloucester, neither the rule nor its exceptions could have been of much consequence previous to that period. After the passing of that act, questions between landlord and tenant occasionally arose in actions of waste, and an opinion was soon expressed by the court, that a lessee engaged in trade and who had set up fixtures for the purpose of carrying that trade on advantageously, had, in some cases, a right to remove them at the expiration of his term. This seems to have been mooted in Year-book 42 E. 3, fo. 6, pl. 19; but is first expressly laid down in 20 H. 7, fo. 13, pl. 24, as follows: "*Si le lessee per ans fait ascun furneis pur son avantage, ou dier fait des fats et vaissels pur occupier son occupation, durant le terme il peut remuer eux. Mais s'il souffert eux etre fixe al terre apres le fin del terme, doncq. ils appeirt al lessor. Et sic d'un baker. Et n'est ascun Waste de remuer tiels choses deins le terme.* In this case not only was the exception in favour of traders' fixtures pointed out, but also, as will have been seen, the limitation in point of time which still prevails, and which obliges a tenant who has a right to remove fixtures, to do so during his term. Mr. Amos, in his valuable work, contends with much ingenuity, that this case establishes an exception in favour of other fixtures set up by lessees for years, besides trading fixtures, and he argues that the words *si le lessee a fait ascun furneis pur son avantage,* must be taken to mean, if the lessee have set up any furnace *for his pleasure,* and he cites a book entitled "*Un abridgement de touts les ans du Roy Henri le Sept,*" where the words "*pur son plesure*" are substituted for "*pur son avantage.*" But this abridgment is scarcely to be relied on, for it omits the subsequent words, *pur occupier son occupation,* which are very important to the question mooted by Mr. Amos. There certainly appears to be some improbability in the idea of the lessee having put up a furnace in his house *for pleasure.* Besides Co. Litt. 53 a, is express that, in ordinary cases, a furnace could not be removed; and, if it *were* removable in all cases, why should the words *pur son avantage* have been added at all?

This is, however, merely matter of curiosity, for the law respecting the tenant's right to remove fixtures was not long allowed to depend upon decisions in the Year-books, and his privilege of removing trade fixtures was firmly established by *Poole's Case,* 1 Salk. 368, Mich. 2 *Annæ;* where it is laid down by Lord Holt among other things, "that during the term, a soap-boiler might well remove the vats he set up in relation to trade, and that he might do it by the common law (and not by virtue of any special custom) in favour of trade, and to encourage industry. But after the term they become a gift in law to him in the reversion and are not removable." This case was followed by many others asserting the same exception, and grounding it on the same reason, namely, the encouragement afforded to trade by public policy. *See Lawton* v. *Lawton,* 3 Atk. 13. *Lawton* v. *Salmon,* 1 H. Bl. 259 n. *Penton* v. *Robart,* 2 East 90. *Dean* v. *Allaly,* 3 Esp. 11. *Trappes* v. *Harter,* 4 Tyrwh. 624; and the text. The benefit of this exception was held in *Lawton* v. *Lawton,* to apply to a fire-engine erected under a shed, and which could not be removed without considerable injury to the freehold: in *Dean* v. *Allaly,* 3 Esp. 11, to a shed set up for trading purposes, called a *Dutch barn,* having a foundation of brick-work and uprights fixed in and rising from the brick-work and supporting the roof which was composed of tiles and the sides open: in *Fitzherbert* v. *Shaw,* 1 H. Bl. 528, to a shed built on brick-

work, and to posts and rails. From *Penton* v. *Robart*, 2 East, 88; 4 Esp. 33, as explained by Mr. Amos, little more can be certainly collected than that Lord *Kenyon* at N.P., and the court afterwards, thought that the mere erection of a chimney would not prevent the right which would have otherwise existed of removing the surrounding building. In *Thresher* v. *E. L. Waterworks Company*, 2 B. & C. 608, the question was discussed, whether the tenant could remove a lime-kiln substantially built of brick and mortar at the cost of 160*l.*, and having its foundations let into the ground. The case, however, turned upon other points.

It sometimes happens that the tenant's right does not depend altogether on the general law, but is extended by a special custom or *lex loci*. See in *Culling* v. *Tuffnall*, B. N. P. 34, per *Treby*, C. J., *Lawton* v. *Salmon*, 3 Atk. 15 n. per Lord *Mansfield*. *Wetherell* v. *Howells*, 1 Camp. 227, *Davis* v. *Jones*, 2 B. & A. 165, *Trappes* v. *Harter*, 4 Tyrwh. 603.

To whatever extent the right to remove trade fixtures may be carried, common sense and justice seem to require that it should be bounded by the rule laid down by Lord *Hardwicke* in *Lawton* v. *Lawton*, viz. that the principal thing "shall not be destroyed by the accessary." It may perhaps be deduced from this, that, if a trading fixture could not be removed without the destruction or great and serious injury of some important building, it would be irremovable. But when the building is but an accessary to the fixture, such as an engine house, and built to cover it, there we have the authority of the text for saying that one as well as the other is removable.

The principal case shows that the tenant's privileges with respect to fixtures set up for trading purposes, does not extend to those set up for agricultural ones. Some very sensible observations on this point are to be found in the work of Mr. Amos, who argues with great force that the opinion expressed by Lord *Ellenborough* in the text, *viz.* that the doctrine sought to be established by the defendant, "was contrary to the uniform current of legal authorities," can hardly be maintained; and that the rule laid down by his lordship is liable to this further objection, that it has a tendency to confine the privilege of the tenant within narrower limits than are designated by the policy to which it owes its existence; and there seems no good reason for conferring it on trade to the exclusion of husbandry, a pursuit equally advantageous to the community, and which is now, like manufactures, often carried on by the aid of valuable machinery. Even if the privilege *be* confined to *trade*, still many of the occupations of the agriculturist are *trades*, using that word in its extended sense, not in the narrow and technical one which it expresses in the Bankrupt Act. The opinion that *trade* ought, with reference to the subject now under discussion, to bear this more extended sense, is countenanced by *Lawton* v. *Lawton*, 3 Atk. 13; *Dudley* v. *Warde*, Amb. 113, in which Lord *Hardwicke* appears to have considered the privilege in question as belonging to fixtures by means of which the owner carried on a species of trade by which he rendered the produce of his own land available to his own profit. Of a somewhat similar description are the cases of nurserymen and gardeners, who may remove trees, shrubs, and other produce of their ground, planted by them with a view to sale (see *Penton* v. *Robart*, 2 East, 91; 7 Taunt. 191; 4 Taunt. 316; see also *Wansborough* v. *Maton*, 4 A. & E. 884; *R.* v. *Otley*, 1 B. & Ad. 161), which ordinary tenants cannot do, *Empson* v. *Soden*, 4 B. & Ad. 656; 1 N. & M. 720. In *Penton* v. *Robart*, this privilege was considered to extend to greenhouses and other similar erections. "Shall it be said," asked Lord *Kenyon*, C. J., "that the great gardeners and nurserymen in the neighbourhood of this metropolis, who expend thousands of pounds in the erection of greenhouses and hothouses, &c. are obliged to leave all these things upon the premises, when it is notorious that they are even permitted to remove trees, or such as are likely to become such, by the thousand in the necessary course of their trade? If it were otherwise, the very object of their holding would be defeated." 2 East, 90. Lord *Ellenborough*, however, in the principal case, disapproved, as will have been seen, of such an extension. See too *Buck-*

land v. *Butterfield*, 2 B. & B. 58, *per Dallas*, C. J.

Upon the whole, the extent of the tenant's right with respect to agricultural fixtures, does not seem, even as yet, quite defined. It is clear that it does not go beyond, and unless the opinion expressed by Lord *Ellenborough* in the principal case be modified, it falls considerably short of, his rights with respect to trading fixtures.

With respect to fixtures put up for purposes of *ornament* or *convenience*, Lord *Holt* had, in *Poole's* case, 1 Sal. 368, expressly denied the right of the tenant to remove them, and a similar doctrine had been laid down long before in *Herlakenden's* case, 4 Co. 64, though denied in *Squier* v. *Mayer*, 2 Freem. 249. But whether the opinion of Lord *Holt* expressed in *Poole's* case, was or was not warranted by the old authorities, it is now settled that there are many ornamental fixtures which the tenant is entitled to remove. Such are hangings and looking-glasses, *per curiam*, in *Beck* v. *Rebow*, 1 P. Wms. 94; tapestry and iron backs to chimneys, for the executor is entitled to these as against the heir, *Harvey* v. *Harvey*, Str. 1141, and the tenant's privileges against the landlord are more extensive: (see too *per Gibbs*, C.J., in *Lee* v. *Risdon*, 7 Taunt. 191:) wainscot fixed *by screws*, and marble chimney-pieces, *per* Lord *Hardwicke* in *Lawton* v. *Lawton*, 3 Atk. 15, and *Exp. Quincey*, 1 Atk. 477, and *per* Lord *Mansfield*, 1 H. Bl. 260 *in notis*: stoves and grates fixed into the chimney with brickwork, and cupboards supported by holdfasts, *per Bayley*, J., *R.* v. *St. Dunstan*, 4 B. & C. 686; and see *Lee* v. *Risdon*, 7 Taunt. 191; see further *Colegrave* v. *Dios Santos*, 1 B. & C. 77; *Winn* v. *Ingleby*, 5 B. & A. 625; *R.* v. *Londonthorpe*, 6 T. R. 379. In *Grymes* v. *Boweren*, 6 Bing. 437, the tenant was permitted to remove a pump which was attached to a stout perpendicular plank resting on the ground at one end, at the other fastened to the wall by an iron pin which had a head at one end and a screw at the other, and went completely through the wall; "the article," said *Tindal*, C. J. "was one of *domestic convenience*, was slightly fixed, erected by the tenant, and might be removed entire." But in *Buckland* v. *Butterfield*, 2 B. & B. 54; 4 B. M. 240, the court refused to extend the privilege of ornamental fixtures to a conservatory erected on a brick foundation fifteen inches deep, attached to the wall of the dwelling-house by cantilivers let nine inches into the wall, connected with the parlour chimney by a flue, and having two windows in common with the dwelling-house, and to a pinery erected in the garden on a brick wall four feet high. The court said that it was "clear on the one hand that many things of an ornamental nature may be in a degree affixed and yet during the term may be removed; and, on the other hand, equally clear that there may be that sort of fixing or annexation which, though the thing annexed may have been merely for ornament, will yet make the removal of it waste; that every case of this sort must depend upon its peculiar circumstances; and that no case had extended the privilege so far as to include the case then under consideration." Mr. *Amos* remarks that *Buckland* v. *Butterfield* may be considered as the leading case upon the subject of ornamental fixtures. Whether wainscot fixed without screws can be removed, may, perhaps, be questionable. Lord *Hardwicke* thought it could, but said it was a very strong case, and many of the older authorities are the other way. See the subject discussed, *Amos*, 79, *in notis*, where four circumstances are pointed out as mainly essential to be regarded wherever the question is whether a fixture of an ornamental nature be removable. 1. The mode in which and the extent to which it is united with the premises. 2. Its nature and construction; as whether it appear to have been intended as a temporary or as a permanent improvement. 3. Whether its removal is likely to occasion any, or any considerable, damage to the freehold. Lastly, Whether there is any custom or prevalent usage applicable to the case in question.

It has been already observed, that in the very first case which established the tenant's right to remove fixtures under any circumstances, a limitation to the time during which that right endures, was pointed out. That limitation still exists, and was asserted in one of the latest cases

on the subject, *Lyde* v. *Russell*, 1 B. & Ad. 394. The rule is, in the Year-book, 20 H. 7, laid down, as will be recollected, in the following words: "*During his term* he may remove them, but if he suffer them to remain fixed *after the term*, they belong to the lessor:" and the same rule with respect to time is laid down in *Poole's* and several other cases; see *Ex parte Quincy*, 1 Atk. 477; *Dudley* v. *Warde*, Ambl. 113; *Lee* v. *Risdon*, 7 Taunt. 191; *Buckland* v. *Butterfield*, *ubi supra*; *Colegrave* v. *Dios Santos*, 1 B. & C. 79; *Lyde* v. *Russell*, *ubi supra*, and the principal case. In *Penton* v. *Robart*, 2 East, 88, this rule was somewhat enlarged, for in that case it was decided that a tenant who had remained in possession after the expiration of his term had a right to take away fixtures which he might have removed during his term. "He was, in fact," said Lord *Kenyon*, "still in possession of the premises at the time when the things were taken away, *and therefore there is no pretence to say that he had abandoned his right to them*." These words, perhaps, cast some light on the principle which governs this subject. It will be remembered that the words of Lord *Holt*, in *Poole's* case, are, "*After the term they become a gift in law to him in the reversion*, and are not removable." It would seem, therefore, that the landlord's right to them depends upon a presumption of law that the tenant, quitting the premises at the expiration of the term and leaving the fixtures behind him, intended to bestow them on his landlord, to whom they become *a gift in law;* and this, like some other legal presumptions, is perhaps not capable of being rebutted; but *Penton* v. *Robart* shows that the presumption of gift arises, *not* immediately *on the expiration of the term*, but *on the tenant's quitting the premises*, leaving the fixtures behind him. It must, however, be admitted that in the report of the same case at *Nisi Prius*, 4 Esp. 33, Lord *Kenyon* says, "Where a tenant has by law a right to carry away any *erections* or other things on the premises which he has quitted, the inclination of my mind is, that he has a right to come on the premises for the purpose of taking them away." This doctrine seems, however, to assume that a tenant *who has quitted the premises* may still retain a right to the possession of the fixtures, which is the very point in dispute. Mr. *Amos* observes that the true ground on which *Penton* v. *Robart* was decided may have been that the things carried away were *mere chattels*, but the facts stated in the report do not appear to warrant such an explanation. It has been observed, that the presumption which arises on a tenant's abandoning the possession is, *perhaps*, not capable of being rebutted. Still it has never been determined what might be the effect of a formal declaration on quitting that he did not intend to give them to his landlord; see *Davis* v. *Jones*, 2 B. & A. 166. Neither has it ever been decided upon solemn argument whether a tenant whose interest is uncertain in point of duration may not have some period after the expiration of his tenancy allowed him for the removal of his fixtures, and, indeed, the case of emblements and one or two other analogies, afford reason for believing that such a distinction would be established in his favour. It has never been determined *upon solemn argument*, but the point might have been involved in the late case of *Wansborough* v. *Maton*, 4 Ad. & Ell. 884. There, a tenant for lives, whose interest had expired, and who had quitted the premises, recovered in trover a wooden barn, which rested by its own weight on a stone foundation. This case is, however, *really* open to the observation which has (though, perhaps, groundlessly) been made on *Penton* v. *Robart*, *viz.*, that the barn was not a fixture, but a mere chattel, and the decision appears to have proceeded on that ground alone.

But whatever may be the precise limitation where the parties are silent, it is clear that they have a right to fix one for themselves by special agreement; see *Naylor* v. *Collinge*, 1 Taunt. 19; *Penry* v. *Brown*, 2 Stark, 403; *Thresher* v. *East London Water-works Co.*, 2 B. & C. 608. And it may be questionable whether such a stipulation might not be created by implication from the custom of a particular district; see *Wigglesworth* v. *Dallison*, vol. 1, *et notas*.

It must further be remarked, that, unless *Penton* v. *Robart* be considered as overruling *Fitzherbert* v. *Shaw*, 1 H. Bl. 258,

it must be taken with the important qualification established by that case, *viz.*, that where the tenant's continuance in possession is under a new lease or agreement, his right to carry away the fixtures is determined, and he is in the same situation as if the landlord, being seised of the land together with the fixtures, had demised both to him. The last case which will be cited upon this part of the subject is *Lyde* v. *Russell*, 1 B. & Adol. 394. It was an action of trover for bells, pulls, cranks, wires, &c. hung by a yearly tenant at his own expense. *After the tenant had quitted*, the landlord took down the bells and refused to deliver them to the tenant unless he would pay 6*l.* which he claimed for rent. The tenant was held not entitled to recover. This case, with which, although the judgment is not long, Lord *Tenterden* is said to have taken great pains, goes a step further than any prior decision, for it shows that on the tenant's quitting the land the property of fixtures vests so completely in the landlord, that even though they are subsequently severed and made chattels, the tenant's right to them does not revive. It seems to have been admitted that the bells were fixtures for domestic convenience, which the tenant might have removed during his term.

2. The next class of cases consists of those in which the question is *between the personal representatives of tenants for life or in tail, and the remainderman or reversioner.* The indulgence extended to the executors and administrators of these persons is not so great as that granted in the case of landlord and tenant, and, therefore, though it may be safely assumed that any fixture removable as between the particular tenant's representative and the remainderman would be so as between landlord and tenant, yet the converse is by no means true, the privileges in the latter case being more extensive, and therefore it is that the cases of *Lawton* v. *Lawton*, 3 Atk. 13; and *Dudley* v. *Warde*, Amb. 113, which really belong to the class which we are now considering have been cited as authorities applicable to the former class. These cases, coupled with the observations of Lord *Mansfield*, in *Lawton* v. *Salmon*, 1 H. Bl. 260, and of the L. *C. J.*, in the principal case, show that the representative of the particular tenant is entitled as, against the remainderman, to fixtures erected wholly or in part for the furtherance of trade, and as the remainderman is less favoured by law than the heir, any decision in favour of the executor of the ancestor against the heir would *à fortiori* be applicable to a case arising between the executor and the remainderman. Now there are some cases in which the executor has been permitted to remove even *ornamental* fixtures as against the heir, *Harvey* v. *Harvey*, Str. 1141; *Squier* v. *Mayer*, 2 Freem. 249; see too *Beck* v. *Rebow*, 1 P.Wms. 94. But these cases do not go far, for the articles given up to the executor in them seem to have been very slightly annexed to the freehold, and rather *chattels* than *fixtures* properly so called.

There is one case in which the question arises, not precisely between the executor of tenant for life and the remainderman, but between the executor of a parson, or other ecclesiastical corporation sole and his successor. In such a case, as the chattels of a corporation sole pass to the executor, he is entitled to certain matters of ornament, such, for instance, as hangings. See Burn, Eccl. L., 304, Gibs. 752. The ornaments of a bishop's chapel indeed are the subjects of a peculiar rule, they are in the nature of heir-looms, and pass to the successor. *Corven's* case, 12 Co. 106.

3. *As between Heir and Executor.*—This is the class in which the privilege of removal is most limited, the heir being a greater favourite of the law than the remainderman. The rule as laid down in *Shepherd's Touchstone*, 469, 470, is, that the executor shall not have "the *incidents* of a house, as glass, doors, wainscot, and the like, no more than the house itself; nor pales, walls, stalks, tables dormant, furnaces of lead and brass, vats in a brew and dye-house, standing and fastened to the walls, or standing in and fastened to the ground in the middle of the house (though fastened to no wall), a copper or lead fixed to the house, the doors within and without that are hanging to or serving any part of the house . . . . But if the glass be from the windows, or

there be wainscot loose, or doors more than are used that are not hanging, or the like, these things shall go to the executor or administrator," and this will be found consonant with the other *ancient* authorities. See Wentw. Exors. 62; Com. Di. Biens B.; 3 Bac. Abr. 63; 11 Vin. Abr. 166. But modern authorities seem to have somewhat relaxed the strictness of this rule, so far as *fixtures* partly or wholly essential to trade are concerned. Thus, in a case before C. B. *Comyn*, and mentioned in *Lawton* v. *Lawton*, 3 Atk. 14, the executor recovered from the heir a cider-mill, let into the ground, and affixed to the freehold; and Mr. J. *Buller* considers the cider-mill as on a footing in this respect with other trading fixtures of the same sort, as "brewing-vessels, coppers, and fire-engines." B. N. P. 34. Yet in *Lawton* v. *Salmon*, 1 Hl. Bl. 260 n.; 3 Atk. 15 n., Lord *Mansfield* refused to extend the privilege to salt-pans, though the freehold would not have been injured by their removal, saying, that the inheritance, as had been proved, could not be enjoyed without them; and he spoke doubtingly of the authority of the case of the cider-mill. See too the expressions of Lord *Hardwicke*, in *Dudley* v. *Warde*, and in *Exp. Quincey*, 3 Atk. 477; and B. N. P. 34, where the existence of any privilege as against the heir in respect of trading fixtures, seems to be denied. See too Lord *Ellenborough's* expressions in the principal case.

With respect to *ornamental* fixtures, it has been already stated, that the cases of *Squier* v. *Mayer*, 2 Freem. 249; and *Harvey* v. *Harvey*, 2 Str. 1141, were between heir and executor. In the former, hangings nailed to the walls, and a furnace fixed to the freehold and purchased with the house, were given to the executor, and the authority of *Herlakenden's* case to the contrary denied. In the latter, hangings, tapestry, and iron backs to chimneys, were recovered by the executor in trover; it would however be difficult to support this case on any ground, except that the articles recovered were looked upon as mere chattels, for *Colegrave* v. *Dios Santos*, 2 B. & C. 76, is an authority that *fixtures* cannot be recovered in an action of trover. See too *Minshull* v. *Lloyd*, 2 Mee & Welsb. 459.

In *Beck* v. *Rebow*, 1 P. Wms. 94, A. B. had covenanted to convey a house and *all things affixed to the freehold thereof*; this was held not to include hangings and looking-glasses fixed to the walls with nails and screws, *and which were as wainscot, there being no wainscot underneath*. A contrary opinion had been expressed the year before in *Cave* v. *Cave*, 2 Vern. 508; 3 Bac. Ab. 63, with respect to *pictures put up instead of wainscot*, the Lord Keeper thought that they belonged to the heir, for *that the house ought not to come to him maimed or disfigured*. There is, therefore, some contradiction among the authorities on this subject; and besides *Herlakenden's* case, and *Cave* v. *Cave*, *dicta* will be found in very modern cases, which militate against such an extension of the executor's rights as *Beck* v. *Rebow* would appear to warrant. See the judgment in the principal case, and in *Lawton* v. *Salmon*, 1 H. Bl. 260 n.; *Winn* v. *Ingleby*, 5 B. & A. 625; *Colegrave* v. *Dios Santos*, 2 B. & C. 76; and *R.* v. *Inhabs. St. Dunstan*, 4 B. & C. 686. The rule laid down by Mr. Justice *Blackstone* is, "Whatever is *strongly affixed* to the freehold, or inheritance, and cannot be severed thence without violence or damage, *quod ex ædibus non facile revellitur*, is become a member of the inheritance, and shall therefore pass to the heir."

4. There is another class of cases in which questions have arisen as to the right to fixtures; those, *viz.*, arising *between vendor and vendee, mortgagor and mortgagee*. There appears to be no doubt, that upon a sale of the freehold, fixtures attached to it will pass in the absence of any express provision to the contrary. See *Ryall* v. *Rolle*, 1 Atk. 175; *Steward* v. *Lombe*, 1 B. & B. 507; *Thresher* v. *E. London Waterworks Co.* 2 B. & C. 609. And in *Colegrave* v. *Dios Santos*, 2 B. & C. 76, the court appears to have considered the rule between vendor and vendee to be the same as that between heir and executor. "In the case of an heir selling a house which descends to him, in the absence of any express stipulation, he would be taken to sell it as it came to him, and the fixtures would pass." *Per Bayley*, J., *ibid.* If, however, there be an express term in the agreement relating to the fixtures, that is

of course to be abided by. The words "*fixtures to be taken at a valuation*" are sometimes used; and a learned author is of opinion, that these include such fixtures as would be deemed personal assets between heir and executor. Where a house is demised together with the fixtures, the tenant's interest in them is similar to that which he enjoys in respect of trees; and if he sever them, the right of possession immediately revests in the landlord, who may bring trover. *Farrant* v. *Thompson*, 5 B. & A. 826. As to *mortgages*, there seems no good reason for saying, that a mortgage of lands can be construed to pass any different rights with respect to fixtures than a conveyance. (See *Trappes* v. *Harter*, 3 Tyrwh. 603, as to the construction of such mortgages—in that case the fixtures were held *not* to pass.) The contrary indeed was supposed to have been laid down in *Exp. Quincey*, 1 Atk. 477; but, as Mr. *Amos* has shown, without any very sufficient reason. The continuing possession of fixtures by a mortgagor, after a mortgage of the land to which they are annexed, cannot be treated as a badge of fraud. *Steward* v. *Lombe*, 1 B. & B. 506; *Ryall* v. *Rolle*, 1 Atk. 165; *Minshull* v. *Lloyd*, 2 Mee. & Welsb. 457.

5. Questions respecting the right to fixtures have also arisen *between the assignees of bankrupts and other parties* Generally speaking, the assignees of a bankrupt tenant would be entitled to whatever interest in the fixtures the bankrupt himself possessed. See *Trappes* v. *Harter*, 3 Tyrwh. 603; but 6 G. 4, c. 16, sec. 72, entitles them to goods and chattels which he had at the time of bankruptcy in his possession ordering or disposition by the consent and permission of the true owner, and of which he was reputed owner, and it has sometimes been contended, that this enactment may have the effect of entitling them to fixtures. The chief decision on this subject is *Horn* v. *Baker*, 9 East, 215, which is frequently cited, and so completely falls within the definition of a *leading case*, that it is printed next to that of *Elwes* v. *Mawe* in this collection.

6. *As between Heir and Devisee* it is held, that if tenant for life or in tail devise fixtures, his devise is void, he having no power to devise the realty to which they are incident, *Shep. Touchst.* 469, 470; 4 Co. 62, unless indeed they be such things as would pass to his executor. On the other hand, the rights of the devisee of lands *against the executor* of the devisor would seem, on principle, to be the same as those of the heir in whose place the devisee stands.

HORN *v.* BAKER.

HILARY.—48 *GEO.* 3, *K. B.*

[REPORTED 9 EAST, 215.]

A., B., and C., partners and distillers, occupied certain premises leased to A. and another, and used in common in the trade the stills, vats, and utensils necessary for carrying it on, the property of which stills, &c. afterwards appeared to be in A. On the dissolution of the partnership, which was a losing concern, it was agreed that C. and one J. should carry on the business on the premises; and by deed between the two last and A. it was covenanted and agreed, that A. should withdraw from the business, and permit C. and J. to use, occupy, and enjoy the distil-house and premises, paying the reserved rent, &c. and the several stills, vats, and utensils of trade specified and numbered in a schedule annexed, in consideration of an annuity to be paid by C. and J. to A. and his wife and the survivor; with liberty for C. and J. on the decease of A. and his wife to purchase the distil-house and premises for the remainder of A.'s term, and the stills, vats, &c. mentioned in the schedule: and C. and J. covenanted to keep the stills, vats, and utensils in repair, and deliver them up at the time, if not purchased: and there was a proviso for re-entry if the annuity were two months in arrear. Under this, C. and J. took possession of the premises, with the stills, vats, and utensils, and carried on the business as before; and made payments of the annuity, which afterwards fell in arrear more than two months; but A.'s widow and executrix who survived him did not enter, but brought an action for the arrears, which was stopped by the bankruptcy of C. and J. who continued in possession of the stills, vats, and utensils, on the premises. On a question, Whether such stills, vats, and utensils, so continuing in possession of C. and J. the new partners, and used by them in their trade in the same manner as they had been by the for-

mer partners, of whom A. the owner was one, passed under the stat. 21 *Jac.* 1, *c.* 19, *s.*10 *&* 11, *to the assignees of C. and J. as being in the* possession, order, and disposition *of the bankrupts at the time of their bankruptcy as* reputed owners? *and nothing appearing to the world to rebut the presumption of true ownership in the bankrupts arising out of their possession and reputed ownership, (of which reputed ownership the jury are to judge from the circumstances ;*) *held,*

1. *That the stills which were fixed to the freehold did not pass to the assignees under the words* goods and chattels *in the statute.*
2. *That the vats, &c. which were not so fixed, did pass to the assignees, as being left by the true owner in the possession, order and disposition (as it appeared to the eye of the world) of the bankrupts, as reputed owners.*
3. *That the case would have admitted of a different consideration if there had been a usage in the trade for the utensils of it to be let out to the traders ; as that might have rebutted the presumption of ownership arising from the possession and apparent order and disposition of them.*

This was an action to recover in damages the value of the interest which the plaintiff claimed in certain stills, vats, and utensils, which the first count of the declaration stated that she was entitled to, subject to the use thereof by the defendants during her life; and that being so entitled, and the defendants well knowing the same, they wrongfully and injuriously broke and destroyed part, and sold and disposed of the rest. The second count was in trover for the same goods; to which the defendants pleaded not guilty; and upon the trial before Lord *Ellenborough*, C. J. at the Middlesex sittings after the last term, a verdict was found for the plaintiff for 1000*l.* subject to the following case.

The plaintiff is the widow and executrix of her deceased husband John Horn, who before and at the time of making the indenture of the 20th of March, 1801, after mentioned, was a distiller in Southwark. The defendants are the assignees of Wm. Horn and R. Jackson, who succeeded John Horn in the business of a distiller, and carried on the same until they became bankrupts, as after mentioned. At the time of making the said indenture John Horn held the principal part of the messuages, buildings, and lands whereon he had carried on the business of a distiller in

partnership with Robert Horn and William Horn, and whereon there had been erected a rectifying distil-house, under a lease granted to him and R. Jackson (since dead) for a term which expired on the 30th of Dec. 1804: and he held other parts of the premises under another lease granted to him and the said Richard Jackson, since deceased, for a term which expired on the 24th of June 1805: and he and the said Richard Jackson, now deceased, had before held other parts of the premises under a lease for a term which expired on the 25th of Dec. 1799. The above-mentioned partnership, which was a losing concern, expired before the making of the indenture hereinafter mentioned; and William Horn, at the time of making that indenture, and at the death of John Horn was and now is indebted to the estate of John Horn in 500*l.* in respect of their partnership. By indenture dated the 20th of March, 1801, between John Horn of the one part, and Wm. Horn and Rd. Jackson (the bankrupts) of the other; after reciting the said several leases, and that at the time of making the last lease, the said Rd. Jackson (deceased) was in partnership with John Horn; and that John Horn had lately entered into partnership with Wm. and Robert Horn for a term then expired; and that since the expiration of the last-mentioned lease the premises therein comprised had been used and occupied by John, Robert, and Wm. Horn, as yearly tenants; and that the partnership between John, Robert, and Wm. Horn had before the execution of that deed been dissolved by mutual consent; and that it had been agreed between John Horn of the one part, and Wm. Horn and Rd. Jackson of the other part, that John Horn should withdraw from the business as from the 1st of March then instant, in favour of Wm. Horn and Rd. Jackson, and permit them to use, occupy, and enjoy the said distil-house and other the premises mentioned in the indentures of lease, *and the several vats, stills, and utensils of trade therein or thereon*, and which vats, stills, and utensils were specified in the first schedule written under that indenture, in consideration of an annuity of 600*l.* to be paid to John Horn, his executors, &c. during the life of himself and Elizabeth his wife (the now plaintiff) and the life of the survivor, subject to terms and conditions thereinafter expressed: and reciting farther, that it had been agreed that the debts due

to John, Robert, and Wm. Horn, as late copartners, and also all the horses, carts, drays, and casks, of the late copartnership (*except the vats, stills, and utensils* mentioned in the said first schedule), should be valued and purchased by Wm. Horne and Rd. Jackson; and that a valuation had been made accordingly: by which it appeared that such debts, and the value of such horses, &c. amounted to 1815*l.*; for payment of which a bond had been given by Wm. Horn and Rd. Jackson to John Horn; and that Wm. Horn and Rd. Jackson, by another bond, had been bound to John Horn in 5000*l.*, conditioned for payment of the annuity of 600*l.* per annum to John Horn for the lives of himself and his wife (the plaintiff), and the survivor: he, John Horn, in pursuance of the agreement, and in consideration of the two bonds and the covenants and agreements after contained on behalf of Wm. Horn and Rd. Jackson, for himself, his heirs, executors, &c. covenanted and agreed with Wm. Horn and Rd. Jackson, their executors, administrators, and assigns, that they, *well and truly paying the rents reserved* by the several recited leases, *and performing all and singular the covenants and agreements therein contained* on the lessees' and assignees' parts, and also *duly and regularly paying the said annuity* so secured as aforesaid, should and lawfully might *peaceably and quietly have, hold, use, occupy, possess, and enjoy the said messuage*, tenement, distil-house, and premises thereby demised and mentioned in a certain deed-poll indorsed on the said first lease, and *also the said stills, vats, and things, specified in the first schedule*, during the lives of John Horn and Elizabeth Horn, or the survivor, without any let, suit, &c. of John Horn, his executors, &c. or any person lawfully claiming from him, &c. Wm. Horn and Rd. Jackson, by the indenture of agreement, covenanted to pay the rent reserved by the leases, and to perform the covenants. There was also a proviso in that indenture, that *in case the annuity should be in arrear for two calendar months*, John Horn, *his executors, &c. might re-enter the distil-house and premises, and the same with all and every the stills, vats, and things mentioned in the said schedule have again, repossess, and enjoy as in his former estate*, &c. There was also a covenant, that upon the decease of the survivor of John and Elizabeth Horn, Wm. Horn and Rd. Jackson should be at liberty to purchase the distil-house and premises for the remainder of the term in

the leases, and the stills, vats, and things mentioned in the said schedule. And another covenant that Wm. Horn and Rd. Jackson should keep the said stills, vats, and utensils in repair; and in case they should not purchase the same, that they should at the end of the agreement deliver them up to John Horn, his executors, &c. in good condition, reasonable use and wear excepted. [Then followed the schedule referred to of the different stills and vats, numbered in order, and describing the quantity in gallons which each would contain.] The case further stated, that Wm. Horn and Rd. Jackson took possession of the premises immediately on the execution of the indenture of agreement, and carried on the trade of distillers, and from time to time paid the interest on the bond and the annuity to John Horn, who died about four years ago, and who by his will gave all his property to his wife, the plaintiff, and appointed her sole executrix. Since (*a*) the death of John Horn neither the annuity nor the interest of the bond for 1815*l.* have been regularly paid; but the plaintiff, as she from time to time was in want of money, and notwithstanding the annuity and interest might not be then due, applied to Wm. Horn and Rd. Jackson, who paid her different sums on account of such annuity and interest; and also by her order occasionally paid sums to various persons for her use, and supplied her with liquors and spirits as she from time to time ordered any; so that there was a running account between them and the plaintiff. The following memorandum was signed by John Horn, and indorsed on that part of the deed in the possession of Wm. Horn and Rd Jackson; *viz.* "I the within-named John Horn do hereby undertake and agree to accept and take 500*l.* by equal quarterly payments instead of 600*l.* for the first year's annuity within referred to." To this memorandum there was no date, nor did it appear when it was made. The following indorsement or receipt was also written on the said deed, and signed by the plaintiff as executor of John Horn, *viz.* "March 1st, 1802, Received of the within-named Wm. Horn and Rd. Jackson 500*l.* being one year's annuity due from them this day for the purposes specified herein." There was also the following indorsement on the same deed signed by Elizabeth Horn. "March 1st, 1803. Received of the within-named Wm. Horn and Rd. Jackson 500*l.*, being one year's annuity due from them

(*a*) What follows down to letter *b* was added by consent to the case after the first argument.

this day for the purposes specified therein." The first memorandum appeared to be in the hand-writing of the solicitor who drew the deed: the two last receipts were in the hand-writing of Rd. Jackson. For many months previous to the bankruptcy of Wm. Horn and Rd. Jackson the plaintiff found great difficulty in obtaining money from them; and she permitted the annuity and interest to run in arrear; and *notwithstanding the same were more than two months in arrear*, the plaintiff did not make any claim to *re-enter* the premises, as by the deed she had the power to do: but in May, 1805 brought an action in this court against Wm. Horn and Rd. Jackson to recover the arrears of the annuity, as also to obtain payment of the bond for 1815*l.* and interest; to which action they pleaded eight several pleas, upon seven of which issue was joined: and to the eighth plea Elizabeth Horn demurred: which demurrer was argued, and judgment given for Elizabeth Horn and notice of trial of the said issues had been given at the time of the bankruptcy; but in consequence thereof that cause was not further proceeded in; and there was due for the arrears of the annuity and interest on the bond for 1815*l.*, at the time of the bankruptcy, about 600*l.* (*b*) In April, 1805, *the plaintiff*, after her husband's death, *renewed the leases of the several premises.* Wm. Horn and Rd. Jackson occupied the premises, with the stills, vats, and utensils thereon, and carried on the trade of distillers from the time of executing the indenture of the 20th of March, 1801, to their bankruptcy. A commission of bankruptcy issued against Wm. Horn and Rd. Jackson on the 26th of July, 1806, and they were duly adjudged bankrupts on the 28th; and the messenger under the commission immediately took possession of the demised premises, and also of the vats, stills, and utensils then being thereon. The defendants were afterwards chosen assignees, and an assignment of all the estate and effects of Wm. Horn and Rd. Jackson was duly made to them: upon which notice was given by the plaintiff to the defendants that the several vats, stills, and utensils were the property of the plaintiff, subject to the supposed interest of the bankrupts therein. The things mentioned in the deed, and comprised in the first schedule, consist of stills and vats. The (*a*) stills, five in number, were set in brick-work, and let into the ground. Three vats or worm-

(*b*) See note (*a*), p. 126.

(*a*) What follows down to letter *b* was added by consent to the case after the first argument.

tubs were supported by and rested upon brick-work and timber, but were not fixed in the ground. Sixteen other vats stood on horses or frames made of wood, which were not let into the ground, but stood upon the floor (*b*). The vats were of wood, bound round with iron: the stills were of copper, and connected with some of the vats: others of the vats were also connected and communicated with each other by conductors or pipes. Three stills and vats were in the rectifying distil-house. There were also a great number of other vats under the rectifying distil-house; some of which were standing on brick and timber, and others on horses or frames as above: and which were connected with the vats and stills in the rectifying distil-house. Others of the vats stood on horses or frames, as above described. All the vats in the rectifying distil-house stood on their ends; as did nine of those under the distil-house: the other vats under the distil-house lay on their sides or bilge. The defendants contending, that the vats, stills, and utensils, in the said first schedule contained, belonged to the bankrupts at the time of their bankruptcy, have sold them as part of the estate and effects of the bankrupts. The plaintiff, contending that the same belong to her as executrix of her late husband, by virtue of his will (subject to the use thereof by the assignees in right of the bankrupts during her life), has brought this action to recover in damages the value of her interest therein. The question was, Whether the plaintiff were entitled to recover? it being agreed that if the plaintiff were so entitled, the amount of the damages should be settled out of court.

This case was argued in Michaelmas term last by *Burrough* for the plaintiff, and *Dampier* contrà; and again in this term by *Williams* Serjt. for the plaintiff, and *The Attorney General* for the defendants. The additions to the case which have been noticed were made between the first and second argument.

For the plaintiff (after stating that the question turned on the stat. 21 Jac. 1, c. 19, s. 10 & 11), the attention of the court was called to the preamble to the 11th sect. set forth in the conclusion of the 10th; though it was admitted that the modern cases had put a construction upon the enacting clause beyond the particular mischief recited. The statute reciting "that it often falls out that many persons

before they become bankrupts do convey *their* goods to *other* men upon good consideration, yet still do keep the same, and *are reputed the owners thereof*, and *dispose the same as their own;*" for remedy enacts, that if any person shall become bankrupt, and, at such times as they shall so become bankrupts shall, by the consent and permission of the true owner and proprietary, have in their *possession, order, and disposition*, any goods or chattels whereof they shall be *reputed owners*, and *take upon them the sale, alteration, or disposition as owners;*" in every such case the commissioners shall have power to sell and dispose the same for the benefit of the creditors, &c. Giving effect to the words of the preamble, the true object was to deprive particular creditors of their specific lien on goods, which having been the property of the bankrupt had been secretly conveyed by him to such creditors, who suffered him still to continue in possession and appear to the world as the owner. That provision was made in the case of bankrupts in order to avoid the doubt which had arisen upon the stat. 13 Eliz. c. 5 (*), against fraudulent conveyances to defeat and delay creditors in general (and which doubt still exists on the statute of Elizabeth), whether it were not confined, as at common law it certainly was, to avoid the conveyance as against those only, who were creditors of the party at the time. Wherefore the statute of James extended the provision to all the creditors, as well those who became such afterwards, as those who were such at the time of the conveyance. But still construing the two statutes together, as made *in pari materiâ*, many great lawyers have considered that the preamble in the 10th sect. of the stat. 21 Jac. 1, c. 19, controlled the enactment in the 11th sect. and confined the operation of the statute to cases where the property conveyed to a particular creditor was before that time the property of the bankrupt himself. Of this opinion was Lord C. J. *Holt* and the Court of K. B. in *L'Apostre* v. *Le Plaistrier* (*a*), and Lord C. B. *Parker*, and Lord *Hardwicke*, in *Ryall* v. *Rolle* (*b*): though the contrary has since been held in *Muce* v. *Cadell* (*c*). Still, however, the Court will not go further than the latter case; nor say that the statute shall attach in every instance where a trader is in possession of another man's goods at the time of his bankruptcy, if he were not held out to the world as the ostensible owner by the real proprietor, as in that case the

(*) See *Twyne's case*, *ante* vol. i. p. 1, *et notas*.

(*a*) Mich. 1708, cited 1 P. Wms. 318.
(*b*) 1 Atk. 175, 182; and 1 Ves. 365, 371.
(*c*) Cowp. 232.

bankrupt had been; the true owner having there held out the bankrupt as her husband, and having obtained a licence for the public-house where they lived in his name. But taking the preamble not to control the operation of the enacting clause, still, in order to bring the case within that clause, the bankrupts must not only have such goods in their *possession, order, and disposition,* at the time *by the consent and permission of the true owner,* according to the first part of the clause, but they must also have taken upon them the *sale, alteration,* and *disposition* of them, as owners, by the same *consent and permission;* for these words run through both parts of the sentence: and it must appear either by the terms of the contract between the bankrupts and the true owner, or by evidence *dehors* of the nature of the property, or of the place or circumstances of the possession, that the owner trusted the bankrupts with the *power* of *selling, altering, or disposing of the goods as owners;* or that having the possession, order, and disposition of the goods under such circumstances as might induce the world to believe that they had such a power, the bankrupts did *actually sell, alter, or dispose* of them, *as owners.* In *Walker and others, assignees of Bean,* v. *Burnell* (*a*), household goods and furniture, which were left by the assignees under the first commission so long as seven years in the bankrupt's possession; yet having been so left for a special *bonâ fide* purpose, in order to assist the bankrupt in settling his affairs, and getting in his effects for the creditors; and the bankrupt not having the disposition of the goods so as to sell them; were decided not to be within the statute of James. It was admitted even in *Mace* v. *Cadell,* that every instance of a possession of goods of another by a bankrupt at the time of his bankruptcy was not within the statute; but it was said that the cases of factors, executors, trustees, &c. were *excepted* cases: but the words of the 11th clause, if not restrained by the preamble, are general, and would include those which are called *excepted* cases, as well as any others: they are not, therefore, excepted by the statute itself in terms, but only by construction, as not falling within the reason of it: the statute only attaching on the possession of goods by the bankrupt when such possession is fraudulent; where the true owner has trusted the bankrupt with the power of selling, altering, or disposing of the

(*a*) Dougl. 317.

goods, as owner. And though, perhaps, the bare fact of the possession of chattels may be *primâ facie* evidence that the possessor is the true owner, and has the power of sale, &c. as owner, yet the contrary may be shown, and that the possession of the bankrupt was *bonâ fide*, and consistent with the right of the true owner. A factor is intrusted with the highest power over the goods, the power of sale; but because it is not *as owner*, but *as factor*, which is consistent with his possession and with the rights of the true owner, the case is not within the statute. The same may be said of trustees and executors. So here, the bankrupts had "the possession, order, and disposition" of the goods under the indenture, *as lessees*, and not *as owners;* and they had not the *sale* or *alteration* of them at all, nor the *disposition* of them, *as owners*, so as to affect the property in any way, but only the bare use of them. In some cases the circumstances attending the possession may carry an appearance to the world that the possessor has the sale, alteration, or disposition of the goods, as owner; as where goods usually sold in a shop or warehouse are exposed to view there; and from thence a power to sell, &c., by the consent of the owner who permits this to be done may be fairly implied: but no such inference can arise here, where some of the vats, &c. were actually fixed to the freehold, and others apparently so, and the rest were used in like manner as those which were fixed, and all of them were numbered. In this case the possession was at least equivocal, so as to let in the truth of the ownership. It was just as likely by the mere view of the things that they belonged to the owner of the premises as to the traders who were in possession. They all formed one entire apparatus for distilling, part of which was actually fixed to the freehold; and therefore the bare possession and use of them carried no greater evidence of title than the possession of the premises themselves. And on this ground *Buller*, J., in *Walker* v. *Burnell* (*a*), held that the furniture of the house left in the possession of the bankrupt did not pass under the statute. Wherever the contract between the bankrupt and the true owner, to whom the goods originally belonged, has been *bonâ fide*, and not made for the purpose of giving him a false credit, and the bankrupt's possession and mode of using the property was consistent with such contract,

(*a*) Dougl. 320.

the case has never been held to be within the statute. In *Copeman* v. *Gallant* (*a*), though Lord *Cowper* considered that the preamble did not restrain the enacting words of the clause; yet he held the case not to be within it, in regard that the assignment, which was for payment of the debts of the assignor, was with an *honest intent*. In *Ryall* v. *Rolle* (*b*) the property, which originally belonged to the *bankrupt*, was by him mortgaged and conveyed at different times to several persons; he continuing all the time in possession. That was a fraud directly within the express words of the law. In *Mace* v. *Cadell* (*c*) there was direct evidence of fraud on the part of the true owner; she herself having taken out a licence for the public-house, where the goods were, in the name of the bankrupt, to whom she said she was married; and having at first claimed the goods under a bill of sale from him. *Bryson* v. *Wylie* (*d*) was decided altogether upon the ground of trick and fraud. There was an open sale of a dyer's plant to the bankrupt, and afterwards a private resale by him; notwithstanding which he still continued to keep possession upon payment of a pretended rent. *Gordon* v. *The East India Company* (*e*) was the case of goods invested by the true owner *in the name* of an officer of one of the Company's ships, as *his* privilege; whose property they appeared to the world to be; and which was therefore calculated to deceive his creditors. So in *Lingham* v. *Biggs* (*f*), a creditor, having taken in execution the furniture of a coffeehouse-keeper, permitted him to remain in possession of it under a rent; who therefore appeared to the rest of the world to continue the owner of it in the same manner as before; there being nothing done to notify the change of property, which was clearly fraudulent even within the preamble of the statute. But in that case Lord C. J. *Eyre*, speaking of *Bryson* v. *Wylie*, said that, notwithstanding that decision, he could suppose that a dyer might be in possession of a plant without being the reputed owner. And he also supported the decision in *Collins* v. *Forbes* (*g*), which had been questioned (*h*). But admitting that there were some circumstances of fraud in the last-mentioned case, the principle there established, which has not been questioned, was, that where the bankrupt was in possession of the goods at the time of his bankruptcy, with the consent of the true owner,

(*a*) 1 P. Wms. 320, 1.

(*b*) 1 Atk. 165; and 1 Ves. 349.

(*c*) Cowp. 232.

(*d*) Hil. 24 Geo. 3, B. R., cited in note (*a*) 1 Bos. & Pull. 83.

(*e*) 7 Term Rep. 228.

(*f*) 1 Bos. & Pull. 82.

(*g*) 3 Term Rep. 316.

(*h*) By *Lawrence*, J., in *Gordon* v. *The East India Company*, 7 Term Rep. 237, who now again

bonâ fide, for a special purpose, beyond which he had not the right of alteration or disposition, it is not within the statute. The case of *Darby* v. *Smith* (*a*) was considered as an absolute sale of the goods by the trustees of the wife and children to the husband, whom they suffered to continue in possession till the day before his bankruptcy without his paying the stipulated instalments. It would have been useless to have discussed any of these cases if the bare act of possession of the goods of another by a bankrupt at the time of his bankruptcy were sufficient to bring a case within the statute. Now here, by the terms of the deed, the bankrupts had no power over the vats, stills, and utensils in their possession, except the use and repair of them as lessees: they had not the general, but only a special *order* and *disposition* of them by the consent of the true owner: and they had no power of *sale*, *alteration*, or *disposition* of them at all *as owners*. But if the consent or permission of the true owner mentioned in the first part of the 11th clause be not carried to the "*sale*, *alteration or disposition*" mentioned in the latter part; at least those words must be intended of an *actual sale*, *alteration*, *or disposition* of the things by the bankrupt, in order to bind the true owner; for the words of the act are "*and take upon them* (the bankrupts) the sale, &c. as owners;" which is not pretended to have been done by the bankrupts in this case. Consistently with the deed the lessees could not even have removed these goods from the premises demised to any other place, without an implied breach of covenant, to be collected from the whole deed; for they were all scheduled and numbered, and let as an entirety; and if displaced, it could not be told how the numbers applied, and the object of numbering them would be defeated.

It was also objected to the plaintiff's title, that the possession of the lessees at the time of their bankruptcy was not consistent with the deed; because they were only to hold so long as they performed the covenants and paid the annuity reserved; and there was a proviso for re-entry in case such annuity was in arrear for two months: and no re-entry had been made, though the annuity was in arrear for a longer time. To this it was answered that the words of the indenture whereby John Horn covenanted that the lessees "performing all and singular the covenants and

intimated great doubts of that case, as did also Lord *Ellenborough*. The former referred to Mr. *Cullen's* Observations on that case, which he said were very sensible. Cull. Principles of the Bankrupt Laws, 318.

(*a*) 8 Term Rep. 82.

agreements therein contained, &c. and also *duly and regularly paying the annuity*, &c. should quietly possess and enjoy, &c. the premises, and also the stills, vats," &c. were not words of condition, on the breach of which the lessees were no longer to hold over, but in law were only words of covenant on the part of the lessees, for the breach of which a remedy lay upon the covenant; as was determined in *Hays* v. *Bickerstaffe* (*a*). Then, though there was an express power of re-entry in case of such arrear, yet it could not have been executed under the circumstances; for there was a running account between the parties; the plaintiff having received money on account of the annuity from time to time, and the bankrupts having also paid bills for her; and this account was not liquidated. But to warrant a re-entry there must be a demand of the precise sum due, which could not be told by the plaintiff at the time. Besides, as in case of rent reserved quarterly, when two quarters have elapsed, the lessor cannot re-enter for the first quarter, but only for the last; having slipped his opportunity for the other, after another quarter has become due: so here the plaintiff could only have re-entered for the last payment in arrear. But supposing in strictness that the plaintiff might have re-entered, yet as it would not have been prudent to do so, she will stand excused for waving the exercise of an odious right of forfeiture, against which a court of equity would of course have relieved the lessees, on payment of the arrears: and this, even since the stat. 4 Geo. 2, c. 28, s. 2, if the application for relief were made within six months (*b*).

(*a*) 2 Mod. 34, 5.

(*b*) *Doe* v. *Lewis*, 1 Burr. 619.

For the defendants, it was contended that the possession of the bankrupts was not consistent with the deed; for by that, in the event which happened of the annuity falling into arrear, the plaintiff was entitled to enter and take possession of the goods in question; instead of which she left them in the possession of the traders, and brought an action for the arrears, which was defeated by their bankruptcy. As to the difficulty of making a demand for the precise sum before re-entry, the strictness of law in that respect only applies to cases of re-entry for non-payment of rent where the demand must be on the land, and not to the re-possession of goods for non-payment of an annuity for which they were a security, in which case the demand may be made

any where. However, if a previous demand of the precise sum were necessary, the difficulty of ascertaining it, occasioned by the act of the annuitant herself, would be no reason why as between these parties she should be excused for not having made it. If she were entitled to possession under the deed in the event which happened, and by taking the necessary measures, whatever they might be, would have been in possession, the subsequent possession of the bankrupt was against the stipulations of the deed: and this brings the case within *Darby* v. *Smith* (*a*), which is very like the present in its circumstances; for there the trustee had a right to enter and repossess himself of the goods, if the stipulated payments were not made; and having neglected to do so, after default made in all but the first instalment, the possession of the bankrupt was held to be within the statute; though as between the parties to the contract the transaction was *boná fide* and no fraud in fact intended. But admitting that the possession of the bankrupts was in pursuance of the deed, it does not follow that their possession was not within the statute. If this were so, every case of this sort might be taken out of the statute. The possession of a mortgagor of goods is not inconsistent with his title, and yet it has never been doubted since *Ryall* v. *Rolle* (*b*) that it was within the statute. It is the *reputed ownership* of the goods in the possession of the bankrupt which brings the case within the express words of the statute, the avowed object of which was to defeat those secret conveyances, by which personal property is secured to particular creditors, while to the eye of the world it is left in the *possession, order, and disposition* of the bankrupt, who by means of it obtains a false credit. It is now fully settled since the case of *Mace* v. *Cadell* (*c*) that the preamble does not control the enacting words of the 11th clause of the act. But it is argued, that the bankrupt must not only have the *possession, order, and disposition* of the goods, with the consent of the true owner, but also the power of *sale, alteration and disposition,* by the same *consent.* Certainly the bankrupt need not have actually sold and delivered the goods; for then the question would never arise, as was observed by *Eyre,* C. J., in *Lingham* v. *Biggs* (*d*); for the act only gives the assignees of the bankrupt power to appropriate goods *in his possession.* But the same learned

(*a*) 8 Term Rep. 82.

(*b*) 1 Atk. 165.

(*c*) Cowp. 232.

(*d*) 1 Bos. & Pull. 87.

Judge says, that "if the man be *reputed owner* of the goods, and *appear* to have the *order and disposition* of them, he must be understood to have taken upon himself the *sale, alteration, and disposition* within the meaning of the statute." Neither could it be the meaning of the statute that the bankrupt should be the true owner of the goods, because, as Lord *Hardwicke* said in *Ryall* v. *Rolle* (*a*), the Legislature has explained its sense by putting the words *true owner* in opposition to the *reputed owner*. Nor could it mean that the bankrupt should have the *power of sale*, &c. by the *consent of the true owner;* for then his selling or otherwise disposing of them would be no breach of the private contract between them. In every case where any question can arise, the reputed ownership of the bankrupt must be limited, as between him and the true owner, by some secret stipulation abridging the general right of disposition: and it was the very object of the act to prevent the operation of such secret engagements, which enabled traders to obtain a false credit by means of the apparent or reputed ownership which their visible possession of the goods of others gave them. It is no question therefore in these cases what is the real contract in the deed; for that could not be known at the time to third persons who were dealing with the trader. The only question which can be made, consistently with the words and object of the statute, is, whether the trader in possession at the time of his bankruptcy had the apparent order and disposition of the goods? if to the eye of the world he appeared to be the owner of them, or was, as the statute calls him, the *reputed owner*, the case is within the statute: though in truth there was a secret conveyance or agreement by which the property was made over or secured to another. This, as was said by *Buller*, J., in *Walker* v. *Burnell* (*b*), must always be more a question of fact than of law. When the fact of the reputed ownership is clearly ascertained, the law follows of course. Every man, says *Eyre*, C. J., in *Lingham* v. *Biggs* (*c*), who can be said to be the *reputed owner*, has incidentally the order and disposition of goods: and if he be reputed owner, and appear to have the order and disposition of them, he must be understood to have *taken upon himself* the *sale, order, and disposition*, within the meaning of the statute. And if the real owner do not take such means as may be in his power

(*a*) 1 Atk. 183.

(*b*) Dougl. 317, and *vide* this noticed by *Eyre*, C. J., in *Lingham* v. *Biggs*, 1 Bos. & Pull. 89.

(*c*) 1 Bos. & Pull. 87.

to prevent the public being imposed upon by such false appearance, that is the very mischief meant to be remedied by the act; and the bankrupt must be taken to have the possession, order, and disposition of the goods by consent of the owner: and the being in possession under such circumstances from whence the order and disposition of the goods may be reasonably inferred makes the reputed ownership. Now here every circumstance of notoriety tended to show that the bankrupts were the true owners of the goods, whether considering the possession before the indenture of the 30th of March, the time and circumstances under which the bankrupts took possession under that deed, the avowed purpose for which it was made, or the continued possession and apparent ownership of the bankrupts after the transfer in the same manner as before. William Horn, one of the bankrupts, had been in partnership with John Horn, the testator, before the transfer; they carried on business jointly upon the same premises, and had a joint use of the vats, stills, &c., and to the eye of the world at least the property belonged to the partnership, however it might be as between themselves. Rd. Jackson had also an interest with John Horn in the lease. The business was a losing concern; and John Horn, wishing to get out of it, appeared to the world to withdraw himself from it; and Wm. Horn appeared to continue in possession of the premises and of the vats, stills, and utensils for carrying on the business, together with Rd. Jackson, and to exercise the same acts of ownership as he had done before when in partnership with John Horn. But in fact John Horn had secretly conveyed this property to Wm. Horn and Rd. Jackson, saddled with the annuity to himself and his wife, which was likely to ruin the trade more rapidly than before. But there was no notice of the change to other persons dealing with the partnership; the deed was kept secret from them; the object of all the parties being, that the trade might be carried on by the existing partners with the same apparent capital as the old firm, and that the credit of the new partnership might not be lessened by the general knowledge of the fact, that the goods in question were not their property. The secrecy of the transfer was as much for the benefit of John Horn as of the continuing partners; for if their credit were shaken, they would be less able to

pay the stipulated annuity. In fact the bankrupts did gain a false credit by the possession of the goods in question. There is no fact of notoriety to resist the conclusion that these were the goods of the bankrupts: and the only fact relied on to show that the property was not theirs is the secret indenture of the 20th of March, 1801, by which a prior claim on the goods was secured to John Horn; but such a secret transfer is of the very species of fraud which the statute meant to guard against. The case of *Bryson* v. *Wylie* (*a*) cannot be distinguished from this in principle. The bankrupt there had the possession of the dyer's plant, but he had not paid for it: he therefore agreed to assign it to the creditor, and to take it again on lease from him. There was no *mala fides* or fraud in the transaction as between those two; and if the interest of no other person had been concerned, it was only just and reasonable that the creditor should have had his security: yet that was avoided by the operation of the statute, as fraudulent in law against the creditors in general. The case of *Darby* v. *Smith* (*b*) is strong to the same point. The case of *Walker* v. *Burnell* (*c*) turned as it seems on the notoriety of the goods which were left in the bankrupt's possession continuing the property of the assignees under the first commission: but that is a very doubtful case. The honesty of the intent of the true owner cannot be sufficient to protect the goods; for according to the report of *Copeman* v. *Gallant* in 7 Vin. Abr. 89. Lord *Cowper* said, "If possession and disposition be given to a person who becomes bankrupt, *though no intent of fraud appear;* yet, if it give a false credit, there is the same inconvenience as if fraud were intended, &c.; and it matters not whether it were by fraud, or only by neglect, or out of a humour." And this was admitted in *Bucknell* v. *Royston* (*d*) in the case of a bankruptcy.

(*a*) Hil. 24 Geo. 3, B. R. cited in 1 Bos. & Pull. 83.

(*b*) 8 Term Rep. 82.

(*c*) Dougl. 317.

(*d*) Prec. in Chan. 287.

In the course of the argument *Grose*, J., asked whether there were any usage in the trade for distillers to hire or lease vats, stills, &c. with their premises? To which it was answered by the defendant's counsel, that no such usage appeared; and unless it were expressly found by the case, the presumption would be, that things necessary to carry on the trade were provided by the traders themselves: and that the possession of such things, which were of great value, must naturally give more credit to the distillers than

the mere view of the spirits distilled, which often belonged to others. Lord *Ellenborough*, C. J., also observed at the conclusion of the argument, that nothing had been said with respect to the distinction between such of the vats and stills as were affixed to the freehold, and those that were moveable, and would be the subject of trover; between which, he said, the court thought that there was a material distinction; the words of the statute of James being *goods and chattels*. And upon asking *The Attorney-General* whether he meant to insist upon the right of the assignees to such of the articles as were affixed to the freehold; and referring to in *Ryall* v. *Rolle*, and being answered in the negative, his Lordship said, that if the rest of the court agreed with him in opinion as to the right of the assignees to such of the articles as properly fell under the denomination of goods and chattels, it would be better to leave it to a referee to ascertain out of court the difference of the value for which the verdict should be entered.

Lord *Ellenborough*, C. J., then proceeded.—The true object of the statute 21 Jac. 1, c. 19, s. 10 and 11, was to make the *reputed* ownership of goods and chattels in the possession of bankrupts, at the time of their bankruptcy, the *real* ownership of such goods and chattels, and to subject them to all the debts of the bankrupt: considering that such reputed ownership would draw after it the real sale, order, alteration, and disposition of the goods. The stills, it appears, were fixed to the freehold; and as such, we think, would not pass to the bankrupt's assignees under the description of goods and chattels in the statute. But as to the vats and utensils, there is nothing in the case to rebut the reputed ownership following the possession of the bankrupts after the dissolution of the old firm, when the business was continued to be carried on by the bankrupts alone, in the same manner as it followed the possession of the antecedent partnership when the trade was carried on by John, Robt. and Wm. Horn. Before the deed of the 20th of March, 1801, though John Horn might have had a priority of claim to the stills, vats, and utensils, as between him and his partners; yet to the eye of the world the apparent ownership of them was in the partners, John, Robert, and William Horn. After the deed John demised these things to Wm. Horn and Richard Jackson, who continued to carry

on the trade after he had retired from it, finding it to be a losing concern; and instead of reserving a rent, he reserved an annuity payable to himself and his wife and the survivor of them, with a liberty to the new partners to purchase these articles on the death of such survivor. Under this agreement Wm. Horn and Richard Jackson continued in possession of the property, carrying on the trade in the same manner as was done before; and to the eye of the world the property of these goods appeared to be vested in them in the same manner as it appeared to be in the former partnership. As between the parties to the contract, the new partners could not, indeed, sell, alter, order, or dispose of the property but according to the provisions of that deed: but as to the world in general, they appeared to have the same right over it which the former partners had. Had they not then the *reputed* ownership? If, as in some manufactories, where the engines necessary for carrying on the business are known to be let out to the several manufacturers employed upon them, there had been a known usage in this trade for distillers to rent or hire the vats and other articles used by them for the purpose of distilling, the possession and use of such articles would not in such a case have carried the reputed ownership. But in the absence of such a usage, there is nothing stated in the case which qualifies the reputed ownership arising out of the possession and use of the things in their trade. The world would naturally give credit to the traders on their reputed property; and the person who permitted them to hold out to the world the appearance of their being the real owners ought to be answerable for the consequences, and was so intended to be by the statute. For some time it was *vexatio questio* whether the preamble controlled the enacting words, so as to confine the operation of the statute to cases where the bankrupt was the original owner of the property conveyed by him to the particular creditor; but the enacting words have been long held not to be so controlled. Here, in fact, the bankrupts were only lessees of these goods; but that was a secret known only to the parties themselves; and nothing appeared to teach the world that the bankrupts could not bind the property to the full extent of it. This is a case then which comes within the fair construction of the enacting words. The case of *Bryson* v.

Wylie bears strongly on the present; for that was not the case of a mortgagor keeping possession of goods, as might be supposed from the note of what was said by Lord *Mansfield:* but the plaintiff, who was the original owner of the plant, finding that Simpson, to whom he had sold it on the security of two promissory notes, was not able to pay the notes when due, agreed to take back the plant and give up the notes, and to let the plant to Simpson at a rent: under which agreement Simpson continued in possession of it up to the time of his bankruptcy. Mr. Justice *Buller* there distinguished the case from that of a banker or factor who by the course of trade must have the goods of other people in his possession; and therefore it did not hold out a false credit to the world. He meant, therefore, to say, that where the possession did hold out a false credit to the world, there the statute would follow it, and attach upon the goods. And the cases of *Mace* v. *Cadell*, and *Lingham* v. *Biggs*, are authorities to the same purpose. The principle to be deduced from all of them is, that where the reputed ownership of the goods in the trader is permitted to be held out to the world, it shall, with respect to the world, be considered as the real ownership. I do not enter into the question, whether the bankrupts' possession were consistent with the deed; because that would only apply to the time after which the plaintiff might have re-entered for non-payment of the annuity. Her not doing so might, perhaps, be argued as more distinctly showing her intention to exhibit the apparent ownership of the bankrupts to the world: but I lay no stress on it; for in my view of the case, however consistent their possession might have been with the deed, it would only have shown that the deed itself was the fraud which the statute meant to guard against. The principle is, that in all cases where, by the consent and permission of the true owner of goods, a trader in possession has the apparent ownership, and incidental to that the order and disposition of them; and no other circumstance appears to control such apparent ownership, and show that the trader was not the real owner; the true owner permitting the trader to exhibit this appearance does it at his peril.

Grose, J.—The case of *Mace* v. *Cadell* has put a construction upon the statute, which has ever since settled, that

where the real owner of goods suffers a trader to have the reputed ownership, so as to have the apparent order and disposition of them, and the trader becomes bankrupt, the statute gives the property to the assignees for the benefit of the creditors. I only doubted whether the stills which were fixed to the freehold would pass under this statute; but it is now agreed that they do not. But with respect to the other articles, it is impossible to distinguish this case in principle from the current of those which have been decided, which have gone upon the ground, that where the real owner enables a trader to acquire credit by having the possession, and apparent order and disposition of goods with respect to the world, he does in effect permit such trader to take upon himself, and he has with respect to the world, the apparent sale, alteration, and disposition of the goods, within the meaning of the statute.

Lawrence, J.—The question in these cases, as was observed by Mr. Justice *Buller* in *Walker* v. *Burnell*, is rather a question of fact than of law. And therefore it seems more proper in such cases to leave it to the jury to say whether, under the circumstances, the bankrupt had the reputed ownership of the goods at the time; for if the true owner suffer a trader to have the reputed ownership of goods left in his possession, and become bankrupt, the statute says that the property shall go to his assignees. In this case therefore we are rather called upon to consider, as upon a motion for a new trial, what conclusion a jury should have drawn from this evidence, than to consider a dry question of law. The facts stated are, that one partner upon retiring from business leases to others who continue it (one of whom had been in partnership with him before), certain stills, vats, and utensils proper for carrying on the business, and which had been used by the former partners. The new partners become, in consequence, to the world the apparent owners of the property. It may happen from the course of certain trades, that masses of machinery are let out by the owners to the mechanics engaged in them, and the notoriety of such a usage in the trade may rebut the presumption of ownership which would otherwise arise from the possession; but in general the possession of utensils of trade must be taken to be by the owners of them. And I agree, that nothing turns upon the question whether or not the pos-

session of the bankrupts in this case were consistent with the deed under which they claimed from John Horn: for the very object of the statute was to prevent the true owner from enabling another to hold himself out to the world as such, and thereby gain a false credit: and this being a secret deed, the world could know nothing of its contents. It was pressed in the course of the first argument, that the reputed ownership mentioned in the statute must be understood where there was a power of sale confided to the bankrupt by the true owner; and reference was made to the words of Lord *Mansfield* in *Mace* v. *Cadell*, that the statute did not extend to all possible cases where one man had another man's goods in his possession, as the case of factors, &c., who have the possession as trustees, &c., *to sell for the use of their principal:* "but the goods must be such as the party suffers the trader *to sell as his own.*" But this last expression was evidently used in contradistinction to the case of factors, &c. who sold for other persons and not for themselves. And he could not have meant to lay it down generally; for that was not the case of a sale; but the facts there were, that the owner let the bankrupt into her house, where he passed as her husband: but she never gave him the power of selling the goods, and he never had sold them: yet by treating him as her husband she had given him the reputation of being the owner of the goods; which was held to bring the case within the statute. As to the case of *Bryson* v. *Wylie*, on which my Lord has observed, Lord *Mansfield* certainly considered the whole as a trick and contrivance to evade the statute: and what was said by Mr. Justice *Buller* goes the whole length of our opinion in this case; that a factor, who must in the course of his business have other persons' goods in his possession, does not thereby gain a false credit; but that where the conduct of the true owner enables another in whose hands the goods are, to hold out to the world the reputation of ownership, he thereby gives that other a false credit to the extent of the property so confided; for which the statute meant to make him responsible. It is often a question of fact whether the possession of goods do hold out a reputed ownership in the possessor, as in the case of furniture in lodgings. In the present case, the opinion which we have formed from the facts stated will make it necessary to inquire which of

these articles are fixtures, and which are not: and for the value of the fixtures when ascertained, and beyond that, for the damage which may have been done to the house in removing the fixtures, the plaintiff will be entitled to recover.

Le Blanc, J.—The question is, whether the bankrupts having obtained the reputed ownership of the moveable utensils of the trade by possession of them before and at the time of the bankruptcy, acquired the real ownership by the statute for the benefit of their creditors? I lay out of consideration the question of re-entry of the plaintiff; for I do not think that it makes any difference in this case. This decision will only be an authority for a case where the bankrupts were in possession of utensils necessary for carrying on their trade under a lease; and where there was no usage of the trade for the trader to have such utensils let to him on hire. Wherever such a usage of trade may prevail, the case may deserve another consideration. I must take it upon the facts here disclosed, that John Horn was the owner of the utensils in question before the deed of March, 1801; though that fact is very clumsily stated in the case: the court, however, considers that by some means or another, which do not distinctly appear, these utensils were the property of John Horn; and he demised them to the bankrupts, who were to carry on the trade after he withdrew from it; and without these articles he could not have carried on the trade; and there is no usage in the trade for letting such utensils. The question then is, whether, under these circumstances, the bankrupts had the possession, order, and disposition of the goods by the consent of the true owner? I think they had. For though there are many exceptions, as in the case of factors, bankers, and others who are known to have the goods of other persons in their possession; none of which, it is true, are expressly excepted in the statute; yet the ground of all the exceptions has been, that the possession of such and such descriptions of persons did not carry to the understanding of the world the reputed ownership. The same rule might extend to furniture let with a house, and perhaps even to furniture let without the house to be used there, where such lettings were usual; and, by a parity of reason, to utensils of trade usually let to the traders; because pos-

session in such cases would not carry the reputed ownership of the property, and would not impose on the world a false appearance of property in the possessor.

The verdict to be entered for the plaintiff for the value of the fixtures only, and the damage done in removing them.

One of the points decided in this case, *viz.* that *fixtures*, such as the stills in the text, are not "goods and chattels" within the meaning of the Bankrupt Act, so as to pass to the assignees as goods in the ordering or disposition of the bankrupt, has been affirmed in several subsequent cases. In *Clarke* v. *Crownshaw*, 3 B. & Adol. 804, the decision of the court was expressly founded on the authority of *Horn* v. *Baker*. In *Coombes* v. *Beaumont*, 5 B. & Ad. 72, it was held, that a steam-engine affixed to the freehold for the purpose of working a colliery, and to be used by the tenant during his term, the property remaining in the landlord, would not pass to the tenant's assignees. "The steam-engine," said *Parke*, J., "if affixed to the freehold, clearly does not pass to the assignees, because it does not come within the description of 'goods and chattels,' in 6 G. 4, c. 16, s. 72. This was determined in the case of *Horn* v. *Baker*, and since that case, as far as my experience goes, I never knew that any distinction was made between such fixtures as would be removeable between landlord and tenant, and such as would not." In *Boydell* v. *M'Michael*, 1 C. M. & R. 177, the same doctrine was again affirmed and acted upon by the Court of Exchequer. In that case, a tenant for years, who had taken the fixtures at a valuation from his landlord, mortgaged the term and fixtures, and afterwards became bankrupt: they were held not to pass to his assignees. "The real nature of the tenant's interest," said *Parke*, B., "in this case is, that he had a right to remove the fixtures during the term; that interest has been held sufficient to enable the sheriff to seize them under a *fi. fa.*; but *Horn* v. *Baker* decides that they are not 'goods and chattels' within the meaning of the clause as to the order and disposition of the bankrupt. *The reason of this is, that with regard to real property, the possession is considered as nothing, but the title only is looked to.*" In *Hallen* v. *Runder*, 1 C. M. & R. 766, cited in the beginning of the last note, the court thought that fixtures could not properly be denominated *goods* in an *indebitatus* count, though their value might be recovered in a count for fixtures bargained and sold. And in *Minshall* v. *Lloyd*, 2 Mee & Welsb. 459, *Parke*, B., said, "I assent to the doctrine laid down in *Coombes* v. *Beaumont*, and *Boydell* v. *M'Michael*, that such fixtures are not goods and chattels within the meaning of the bankrupt law, though they are goods and chattels when made such by the tenant's severance, or for the benefit of execution creditors." In *Trappes* v. *Harter*, 3 Tyrwh. 602, (which is said by *Parke*, J., in *Minshall* v. *Lloyd*, 2 M. & W. 456, to have been doubted), trading fixtures were held to pass to the assignees of certain bankrupts, as part of their property, and the assignees having severed and removed them, it was held that a mortgagee of the premises (the mortgage-deed having been decided by the court not to convey these fixtures) could not maintain case against them for injury to his reversion. This decision, it will be seen, is not at all at variance with *Horn* v. *Baker*. Undoubtedly if the fixtures did not pass by the mortgage-deed, the assignees would take them; and whether as personal estate or no seems immaterial.

The case of *Horn* v. *Baker* is a useful one, on account of the light thrown by the discussion in it on the construction of the reputed ownership clause in the

Bankrupt Act. At the time of the decision in the principal case, that subject was governed by 21 Jac. 1, c. 19, s. 10 & 11, which were at first so little acted upon, that no case occurred in which their operation was discussed for upwards of a century. The former of these two sections is a mere recital made by a misprint into a separate section, and gave rise to some doubt in consequence of its being narrower than the enactment, so that it apparently applied only to property which had once been the bankrupt's; and it was for some time thought, that such property only was included in the eleventh section, an idea which the analogy to the statutes respecting fraudulent conveyances appeared to countenance. These doubts, however, were removed by *Mace* v. *Cadell*, Cowp. 232; and the obnoxious recital is now omitted in 6 G. 4, c. 16, s. 72, by which the subject is now governed. That section is almost identical in form, and identical in meaning, with the statute of James, all the decisions upon which are consequently authorities on its construction. It contains indeed a new clause in favour of mortgages and assignments of ships duly registered according to the Ship Registry Act.

Although fixtures, as we have seen, are not within the meaning of this clause, all *personal chattels* fall within it. Ships, *Stephens* v. *Sole*, 1 Ves. 352; *Atkinson* v. *Maling*, 2 T. R. 462.: Furniture, *Lingham* v. *Biggs*, 1 B. & P. 82: Utensils of trade, *Lingard* v. *Messiter*, 1 B. & C. 308 (except, perhaps, when, as hinted in the principal case, there is an usage to demise them to the trader): Stock, *Ex parte Richardson*, Buck. 480: Bills, *Hornblower* v. *Proud*. Policies, *Faulkner* v. *Case*, 3 Bro. C. C. 125; and other *choses in action*: See *Dean* v. *James*, 1 Nev. & Mann. 393; *Ex parte Monro*, Buck. 300: Shares in a company, *Nelson* v. *London Ass. Co.*, 2 S. & S. 292; or in a newspaper, *Longman* v. *Tripp*, 3 N. R. 67, will all of them, if in the possession, ordering, or disposition of the bankrupt, as reputed owner, with the consent of the true owner at the time of his bankruptcy, pass to his assignees, by virtue of 6 G. 4, c. 16, s. 72.

WAIN *v.* WARLTERS.

EASTER.—44 *GEO.* 3.

[REPORTED 5 EAST, 10.]

No person can, by the Statute of Frauds, be charged upon any promise *to pay the debt of another, unless the* agreement *upon which the action is brought, or some note or memorandum thereof, be* in writing; *by which word* agreement *must be understood the* consideration *for the promise, as well as the promise itself. And therefore where one promised in writing to pay the debt of a third person, without stating on what consideration; it was holden that* parol *evidence of the consideration was inadmissible by the Statute of Frauds; and consequently such promise appearing to be without consideration upon the face of the written engagement, it was* nudum pactum, *and gave no cause of action.*

THE plaintiffs declared that at the time of making the promise after mentioned they were the indorsees and holders of a bill of exchange, dated the 14th of February, 1803, drawn by one W. Gore upon and accepted by one J. Hall, whereby Gore requested Hall, seventy days after date, to pay to his, Gore's, order, 56*l.* 16*s.* 6*d.*; which bill of exchange Gore had before then indorsed to the plaintiffs, and which sum in the bill mentioned was at the time of making the promise by the defendant due and unpaid. And thereupon the plaintiffs, before and at the time of making the said promise by the defendant, had retained one A. as their attorney to sue Gore and Hall respectively for the recovery of the said sum so due, &c., whereof the defendant, at the time of his promise, &c. had notice. And thereupon, on the 30th of April, 1803, at, &c. *in consideration of the premises, and that the plaintiffs,* at the instance of the defendant, *would forbear* to proceed for the recovery of the said

56*l.* 16*s.* 6*d.*, he, the defendant, undertook and promised the plaintiffs to pay them, by half-past four o'clock on that day, 56*l.* and the *expenses* which had *then been incurred* by them *on the said bill.* The plaintiffs then averred that they did, within a reasonable time after the defendant's promise, stay all proceedings for the recovery of the said debt, and have hitherto *forborne to proceed* for the recovery thereof; and that the expenses by them incurred on the said bill at the time of making the promise by the defendant, and in respect of their having so retained the said A., and on account of his having, before the defendant's said promise, drawn and engrossed certain writs called special capias, against Gore and Hall respectively on the said bill, amounted to 20*l.*, of which the defendant had notice; yet the defendant did not, at half-past four o'clock on that day, &c. nor at any time before or since, pay the said sum of 56*l.* and the said expenses incurred, &c. There was another special count, charging that the reasonable expenses incurred on the bill were so much, which the defendant had refused to pay. And the common money counts.

In support of the undertaking laid in the declaration, the plaintiffs, at the trial at Guildhall, produced the written engagement signed by the defendant, which was in these words: "Messrs. Wain and Co., I will engage to pay you, by half-past four this day, fifty-six pounds and expenses on bill that amount on Hall. (Signed) Jno. Warlters (and dated), No. 2, Cornhill, April 30th, 1803." Whereupon it was objected, on the part of the defendant, that though the promise, which was to pay the debt of another, were *in writing*, as required by the Statute of Frauds, yet that it did not express *the consideration* of the defendant's promise, which was also required by the statute to be in writing; and that this omission could not be supplied by parol evidence (which the plaintiffs proposed to call in order to explain the occasion and consideration of giving the note); and that for want of suchconsideration appearing upon the face of the written memorandum, it stood simply as an engagement to pay the debt of another without any consideration, and was, therefore, *nudum pactum* and void. And Lord *Ellenborough*, C. J., upon view of the Statute of Frauds, 29 Car. 2, c. 3, s. 4, which avoids any special promise to answer for the debt of another, "unless the *agreement* upon

which the action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith," &c., thought that the term *agreement* imported the substance at least of the terms on which *both* parties consented to contract, and included the *consideration* moving to the promise, as well as the *promise* itself: and the *agreement* in this sense not having been reduced to writing for want of including the *consideration* of the promise, he thought it could not be supplied by parol evidence, which it was the object of the statute to exclude; and therefore nonsuited the plaintiffs. A rule *nisi* was obtained in the last term for setting aside the nonsuit and granting a new trial, on the ground that the statute only required the *promise* or binding part of the contract to be *in writing*, and that parol evidence might be given of the consideration, which did not go to contradict, but to explain and support the written promise.

Garrow and *Lawes* showed cause against the rule.—The question is simply this, Whether *parol* evidence can be given of an *agreement* which the Statute of Frauds avoids, unless it be in *writing?* The words are, " that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, &c. of another person, &c. unless the *agreement* upon which such action shall be brought, or some memorandum or note thereof, shall be *in writing*, and signed by the party to be charged therewith," &c. Now to every *agreement* there must be at least two parties; and, in order to make it available in law, there must be some consideration for it; which necessarily forms part of the agreement itself, being that in respect of which either party consents to be bound. It is no answer to say that the parol evidence offered of the consideration, namely, the forbearance to sue Hall, did not go to contradict the written promise; it is enough that being part, and a material part, of the *agreement*, it was not reduced to writing and signed by the party to be charged, as required by the statute. The effect of such parol evidence, if admitted, would be to render valid that which, so far as appears by the writing itself, is void in law for want of a consideration; and this would be letting in all the dangers of fraud and perjury, which it was the object of the statute to guard against. Upon the face of the paper the

debt appears to be the debt of another; and as a mere promise to pay the debt of another, without any consideration, would, before the statute, have been void as *nudum pactum* at common law; so it is not made good by the statute without a consideration in law for entering into such an agreement; which *agreement*, *i. e.* the whole agreement, or some memorandum or note of the whole, specifying the contracting parties, the consideration, and the promise, must be made in writing. The consideration is an essential part of every executory agreement; and this was altogether executory, on the part at least of the defendant. If the agreement had been declared on as in writing, the mere production of the note would not have proved the consideration of forbearance laid in the declaration; and such consideration could not have been supplied by parol evidence. In *Preston* v. *Merceau* (*a*), where the plaintiff had agreed in writing with the defendant's testator to let him certain premises at a certain rent; parol evidence, tendered to show that the tenant had agreed to pay a further sum for ground-rent to the ground landlord, was rejected as subversive of the Statute of Frauds; although it was there contended that the evidence offered did not go to *alter* but to *explain* the agreement. So in *Gumnis* v. *Erhart* (*b*), the verbal declaration of an auctioneer at the time of a sale, that there was a charge on the estate, was deemed inadmissible to contradict the printed conditions, which stated the premises to be free from all incumbrances.

(*a*) 2 Blac. 1249.

(*b*) 1 H. Blac. 289.

Erskine and *Marryat*, in support of the rule, said that the evidence tendered in the two cases cited went not to explain but to contradict the written agreements; in the one case to increase the *quantum* of the rent specified, in the other to subtract so much as the charge amounted to from the value of the estate, which was offered for sale *free from incumbrances*. But here the parol evidence went merely to show on what occasion the written agreement had been entered into: and it is in common practice to admit parol evidence for such a purpose: it is part of the *res gestæ*, and no part of the agreement itself, which must in its nature be executory at the time of the writing made. The foundation of the action in this case is not the writing, but the *promise* by the defendant to pay the debt of Hall. This, before the Statute of Frauds, might have been proved

wholly by oral testimony, but since that statute, the promise can only be evidenced by writing signed by the party to be charged therewith, or by some other lawfully authorised. It is difficult indeed to account for the introduction of the word *agreement* into the latter part of the clause, which, in its strict sense, as compounded of "*aggregatio mentium*, or the union of two or more minds in a thing done or to be done (*a*)," is more properly applicable to the other branches of the clause, namely, "an *agreement* on consideration of marriage, or upon *contract* or sale of lands, &c., or upon any *agreement* not to be performed within the space of one year, &c., than to any special *promise* by an executor to answer damages out of his own estate, or to any special *promise* to answer for the debt, &c., of another." To such *promises* the word *agreement* can only be considered applicable so far as it is synonymous to *engagement* or *undertaking*, in which sense it is often used in common parlance, and therefore means in this respect the agreement or promise to pay the debt of another. Besides, the statute does not require the *whole* agreement to be set out in form, but it is sufficient if there be a *note* or *memorandum* of it in writing; that is, so much of the agreement as is obligatory on "the party to be charged therewith." In whatever form of words, therefore, the *promise* is made, which before the statute would have been evidence to bind the party making it under the circumstances of the case, it will, if those words are reduced into writing, still bind him since the statute under the like circumstances. But in either case the inducement for making such promise, which is part of the *res gestæ*, may be evidenced by parol. Thus, suppose a promise in writing to pay the *expenses* attending a certain bill drawn by another; parol evidence must necessarily be let in to show to what bill the promise was meant to apply, and how the expenses arose, and the bill itself would be produced. And this would be evidence not to vary, but to corroborate the written promise. The 3d, 7th, and 17th sections of the act all require the signature of the party to some note in writing in order to charge him with the several subject matters of those sections. But in all those cases the party must be charged on the special written *agreement*; but here he is charged on the *promise*, of which the writing is only evidence. Yet the 4th section supposes that the party is to

(*a*) 1 Com. Dig. 311.

be charged *upon the agreement*, "unless the agreement *upon which* such action shall be brought," &c.; which shews that *agreement* as there used means no more than *undertaking* or *engagement*. And in this sense an *agreement* signed by one party only on a sale by auction was holden sufficient to charge him within the Statute of Frauds (*a*). [Lord *Ellenborough*, C. J. There it was deemed sufficient proof of such agreement so as to charge the party signing it. He was estopped by his signature from protecting himself under the statute. But there the consideration appeared in writing.] They then observed, that though the objection must have often before occurred in actions of this sort, which were in common practice, the word *agreement* had never before received such a construction as applicable to this branch of the clause.

(*a*) *Seton* v. *Slade*, 7 Ves. jun. 265.

Lord *Ellenborough*, C. J., after noticing the definition of the word *agreement* by Lord C. B. *Comyns*, who considered it as a thing to which there must be the assent of two or more minds, and which, as he says, ought to be so certain and complete, that each party may have an action upon it; for which, in addition to the author's own authority, was cited that of *Plowden*; and better (his Lordship observed) could not be cited:

In all cases where, by long habitual construction, the words of a statute have not received a peculiar interpretation, such as they will allow of, I am always inclined to give to them their natural ordinary signification. The clause in question in the Statute of Frauds, has the word *agreement*, ("unless the *agreement* upon which the action is brought, or some memorandum or note thereof shall be in writing," &c.) And the question is, Whether that word is to be understood in the loose incorrect sense in which it may sometimes be used, as synonymous to *promise* or *undertaking*, or in its more proper and correct sense, as signifying a mutual contract on consideration between two or more parties? The latter appears to me to be the legal construction of the word, to which we are bound to give its proper effect: the more so when it is considered by whom that statute is said to have been drawn, by Lord *Hale* (*b*), one of the greatest Judges who ever sat in *Westminster-hall*, who was as competent to express as he was able to conceive the provisions best calculated for carrying into effect the any

(*b*) Lord *Mansfield* expressed a doubt of this in *Wyndham* v. *Chetwynd*, 1 Burr. 418.

purposes of that law. The person to be charged for the debt of another, is to be charged, in the form of the proceeding against him, upon his special *promise*; but without a legal consideration to sustain it, that promise would be *nudum pactum* as to him. The statute never meant to enforce any promise which was before invalid, merely because it was put in writing. The obligatory part is indeed the *promise*, which will account for the word *promise* being used in the first part of the clause, but still in order to charge the party making it, the statute proceeds to require that the *agreement*, by which must be understood *the agreement in respect of which the promise was made*, must be reduced into writing. And indeed it seems necessary for effectuating the object of the statute that the consideration should be set down in writing as well as the promise; for otherwise the consideration might be illegal, or the promise might have been made upon a condition precedent, which the party charged may not afterwards be able to prove, the omission of which would materially vary the promise, by turning that into an absolute promise which was only a conditional one: and then it would rest altogether on the conscience of the witness to assign another consideration in the one case, or to drop the condition in the other, and thus to introduce the very frauds and perjuries which it was the object of the act to exclude, by requiring that the *agreement* should be reduced into writing, by which the consideration as well as the promise would be rendered certain. The authorities referred to by *Comyns*, Plowd. 5. a. 6. a. 9., to which may be added Dyer, 336. b., all show that the word *agreement* is not satisfied unless there be a consideration, which consideration forming part of the agreement ought therefore to have been shewn; and the promise is not binding by the statute unless the consideration which forms part of the agreement be also stated in writing. Without this, we shall leave the witness whose memory or conscience is to be refreshed to supply a consideration more easy of proof, or more capable of sustaining the promise declared on. Finding therefore the word *agreement* in the statute, which appears to be the most apt and proper to express that which the policy of the law seems to require, and finding no case in which the proper meaning of it has been relaxed, the best

otherwise perhaps than by Lord *Hale's* having left some loose notes behind him, which were afterwards unskilfully digested, 1 Blac. 99.

construction which we can make of the clause is to give its proper and legal meaning to every word of it.

Grose, J.—It is said that the parol evidence tendered does not contradict the agreement; but the question is, Whether the statute does not require that the consideration for the promise should be in writing as well as the promise itself? Now the words of the statute are, "that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, &c., of another person, &c., unless the *agreement* upon which such action shall be brought, or some memorandum or note thereof, shall be in writing," &c. What is required to be in writing, therefore, is the *agreement* (not the promise, as mentioned in the first part of the clause), or some *note or memorandum of the agreement*. Now the *agreement* is that which is to show what *each party* is to do or perform, and by which *both parties* are to be bound; and *this* is required to be *in writing*. If it were only necessary to show what *one* of them was to do, it would be sufficient to state the *promise* made by the defendant who was to be charged upon it. But, if we were to adopt this construction, it would be the means of letting in those very frauds and perjuries which it was the object of the statute to prevent. For, without the parol evidence, the defendant cannot be charged upon the written contract for want of a consideration in law to support it. The effect of the parole evidence then is to make him liable: and thus he would be charged with the debt of another by parol testimony, when the statute was passed with the very intent of avoiding such a charge, by requiring that the *agreement*, by which must be understood the *whole agreement*, should be in writing.

Lawrence, J.—From the loose manner in which the clause is worded, I at first entertained some doubt upon the question; but upon further consideration I agree with my Lord and my brothers upon their construction of it. If the question had arisen merely on the first part of the clause, I conceive that it would only have been necessary that the *promise* should have been stated in writing; but it goes on to direct that no person shall be charged on such *promise*, unless the *agreement*, or some *note or memorandum thereof*, that is, *of the agreement*, be in writing; which shews that

the word *agreement* was meant to be used in a sense different from *promise*, and that something besides the mere promise was required to be stated. And as the consideration for the promise is part of the agreement, that ought also to be stated in writing.

Le Blanc, J.—If there be a distinction between *agreement* and *promise*, I think that we must take it that *agreement* includes *the consideration* for the promise as well as *the promise* itself: and I think it is the safer method to adopt the strict construction of the words in this case, because it is better calculated to effectuate the intention of the act, which was to prevent frauds and perjuries, by requiring written evidence of what the parties meant to be bound by. I should have been as well satisfied, however, if, recurring to the words used in the first part of the clause, they had used the same words again in the latter part, and said, "unless *the promise* or *agreement* upon which the action is brought, or some note or memorandum thereof, shall be in writing." But not having so done, I think we must adhere to the strict interpretation of the word *agreement*, which means the *consideration* for which as well as the *promise* by which the party binds himself.

Rule discharged.

The main point involved in this case has been already discussed in the note to *Birkmyr* v. *Darnell*, *ante*, vol. i. p. 134. The case of *Wain* v. *Warlters* is, however, one of so much celebrity, that it would have been improper to omit it in a selection of *leading cases;* it was confirmed, as is there stated, by *Saunders* v. *Wakefield*, 4 B. & A. 596; and has since been acted on in numerous cases which are collected in the note above referred to. It will be recollected, that, according to the statute, the agreement, or some memorandum, or note thereof, is to be in writing, *signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.* On these words it has sometimes been made a question what can be deemed a sufficient signature to meet these words. It is clear that the signature need not be placed in any particular part of the instrument or memorandum. See *Saunderson* v. *Jackson*, 2 B. & P. 238; *Schneider* v. *Norris*, 2 M. & S. 286; *Knight* v. *Crockford*, 1 Esp. 190; which are decisions on the corresponding words in the seventeenth section. In *Johnson* v. *Dodgson*, 2 Mee & Welsb. 653, the following note, written by the defendant, was held sufficiently signed to satisfy the 17th section of the statute.

"*Leeds*, 19 *October*, 1836.

"*Sold John Dodgson* (*the defendant*) 27 *pockets Playsted* 1836 *Sussex at* 103*s. The bulk to answer the sample.*

"4 *pockets Selme Beckley's at* 95*s. Samples and invoice to be sent by Rockingham coach. Payment in banker's at* 2 *months.*

"*Signed for Johnson Johnson & Co.* (*the plaintiffs*).

"*D. Morse*"

"The Statute of Frauds," said Lord *Abinger*, C.B., "requires that there should be a note, or memorandum, of the contract in writing, *signed by the party to be charged.* And the cases have decided that, although the signature be in the beginning or middle of the instrument, it is as binding as if at the foot of it, *the question being always open to the jury, whether the party, not having signed it regularly at the foot, meant to be bound by it as it then stood, or whether he left it so unsigned because he refused to complete it.*" In *Coles* v. *Trecothick*, 9 Ves. 251, Lord *Eldon* said, that "where a party principal, or person to be bound, signs as what he cannot be, a witness, he cannot be understood to sign otherwise than as principal." But in *Gosbell* v. *Archer*, 2 Adol. & Ell. 500, where the purchaser affixed his signature to an agreement for the sale of land, and underneath was written "*Witness, Joseph Newman,*" in the usual place for a witness's signature, Joseph Newman being the clerk of the auctioneer employed to sell the premises, it was urged that Newman must be taken to have signed as agent for the vendor, and it was attempted to show a ratification of his agency. But the court was of opinion, that he signed simply as a witness; and Lord *Denman*, C. J., said that "he thought the above remark of Lord *Eldon* open to much observation; that no such decision had been actually made; and that, if it had, he should pause, unless he found it sanctioned by the very highest authority, before he held that a party attesting was bound by the instrument."

GODSALL *v.* BOLDERO.

MICH. 48 *G.* 3. *K. B.*

[REPORTED 9 EAST, 72.]

A creditor may insure the life of his debtor to the extent of his debt; but such a contract is substantially a contract of indemnity against the loss of the debt; and therefore, if, after the death of the debtor, his executors pay the debt to the creditor, the latter cannot afterwards recover upon the policy; although the debtor died insolvent, and the executors were furnished with the means of payment by a third party.

THIS was an action of debt on a policy of insurance made the 29th of Nov. 1803, under seal of the defendants, as three of the directors of the Pelican Life Insurance Company, on behalf of the company; which recited that the plaintiffs, coachmakers in Long Acre, being interested in the life of the Right Hon. William Pitt, and desirous of making an insurance thereon for seven years, had subscribed and delivered into the office of the company the usual declaration setting forth his health and age, &c. and having paid the premium of 15*l.* 15*s.* as a consideration for the assurance of 500*l.* for one year from the 28th of Nov. 1803, it was agreed that in case Mr. Pitt should happen to die at any time within one year, &c., the funds of the company should be liable *to pay and make good* to the plaintiffs, their executors, &c., within three months after his demise should have been duly certified to the trustees, &c., the sum of 500*l.* And further, that that policy might be continued in force from year to year until the expiration of the term of seven years, provided the annual premium should be duly paid on or before the 28th of November in each year. The plaintiffs then averred, that *at the time of the making the said assurance, and from thence until the death of* Mr. Pitt, they

were interested in his life to the amount of the sum insured; and that they duly paid the annual premium of 15*l.* 15*s.* before the 28th of Nov. 1804, and the further sum of 15*l.* 15*s.* before the 28th of Nov. 1805; and that after that day, *and while the assurance was in force,* and *before the exhibiting the bill of the plaintiffs, viz.* on the 23d of Feb. 1806, Mr. Pitt died; that his demise was afterwards duly certified to the trustees, &c.; since when more than three months have elapsed before the commencement of this suit, &c.; but that the 500*l.* has not been *paid or made good to* the plaintiffs. There were also counts for so much money had and received by the defendants to the plaintiffs' use, and upon an account stated. To this the defendants pleaded, 1st, *nil debent.* 2dly, That the plaintiffs, at the time of making the assurance, and from thence until the death of Mr. Pitt, were not interested in his life in manner and form as they have complained, &c. 3dly, As to the first count, that the interest of the plaintiffs in the policy, and thereby intended to be covered, was a certain *debt* of 500*l.* at the time of making the policy due from Mr. Pitt to the plaintiffs, and no other; and that the said debt afterwards, and *after the death of Mr. Pitt,* and *before the exhibiting of the plaintiffs' bill,* to wit, on the 6th of March, 1806, *was fully paid to the plaintiffs* by the Earl of Chatham and the Lord Bishop of Lincoln, *executors* of the will of Mr. Pitt. Issues were taken on the two first pleas: and as to the last, the plaintiffs, protesting that their interest in the policy thereby intended to be covered was not the said debt mentioned in that plea to be due to them from Mr. Pitt, and no other, replied, that the said debt was not afterwards, and after the death of Mr. Pitt, and before the exhibiting of their bill, fully paid to them by the Earl of Chatham and the Lord Bishop of Lincoln, executors of Mr. Pitt, in manner and form as alleged, &c.: on which also issue was joined.

The defendants paid 31*l.* (*a*) into court upon the first count: and on the trial of the cause before Lord *Ellenborough,* C. J., at Guildhall, it was agreed that a verdict should be entered on the several issues, according to the direction of the court, on the following case reserved.

The policy mentioned in the declaration was duly executed, and the premiums thereon were regularly paid. Mr.

(*a*) There was some discussion in the course of the argument as to the sufficiency of the sum paid into court, in respect of the premiums received; the grounds of com-

Pitt, mentioned in the policy, died on the 23d of January, 1806; which event was duly certified in February, 1806, to the trustees of the Pelican Life Insurance Company. The defendants, before Trinity term last, were served with process issued in this cause on the 3d of June, 1806. Mr. Pitt was indebted to the plaintiffs at the time of the execution of the policy, and from thence up to and at the time of his death, above 500*l.* and died insolvent. On the 6th of March, 1806, the executors of Mr. Pitt paid to the plaintiffs out of the money granted by parliament for the payment of Mr. Pitt's debts 1,109*l.* 11*s.* 6*d.* as in full for the debt due to them from Mr. Pitt. The case was argued in the last term by

puting which did not distinctly appear. The defendant's counsel, however, denied the necessity of paying any thing into court, the risk having once commenced; and ultimately no opinion was given by the court on this point.

Dampier, for the plaintiffs, who contended that they were entitled to recover upon this policy, notwithstanding the payment of the debt to them by Mr. Pitt's executors out of the money granted by parliament for that purpose. It is clear that a creditor has an insurable interest in the life of his debtor, and the amount of the debt is the measure of that interest; and so far the existence and legality of the debt (*a*) is necessary to the validity of the insurance in point of interest under the stat. 14 Geo. 3, c. 48: but it is not the *debt*, quâ *debt*, which is insured, but the *life* of the debtor: it is only necessary that the interest should exist at the time of the insurance made, and continue up to the time of the death of the debtor, as it did in this case: and the sum insured having then become due, and the debtor's estate insolvent, the fact of payment of the debt afterwards by a third party cannot be material; such payment being gratuitous. The validity of the insurance depends upon its agreement with the stat. 14 Geo. 3. c. 48, which was made to prevent "insurances on lives or other events wherein the assured shall have no interest;" and for this purpose it enacts (s. 1.) that "no insurance shall be made by any persons on the life of any person, &c., wherein the persons for whose use, benefit, or on whose account such policy shall be made, shall have no interest, or by way of gaming or wagering;" and it avoids every assurance made contrary to the true intent and meaning thereof. The 2d section prohibits the making any policy on the life of any person without inserting in it the person's name interested therein. And the 3d section provides that "in all cases

(*a*) *Dwyer* v. *Edie*, London sittings after Hil. 1785. Park on Insur. 2d ed. 491; and 2 Marsh. on Insur. 675.

where the insured hath interest in such life, &c., no greater sum shall be recovered from the insurers than the amount or value of the interest of the insured in such life," &c. Now here it cannot be disputed but that all the requisites of the act have been complied with. The only question which can be made is upon the third section, as to the necessity of the interest continuing beyond the time of the event happening on which the insurance is stipulated to be paid, and to the commencement of the action. But the interest need only continue up to the happening of the event insured, when the cause of action arises; and that is the usual averment in actions of this sort: and the defendants by their third plea admit that it continued beyond that time; for they allege that the debt was paid *after* Mr. Pitt's death, though before the action commenced. But if it had been necessary that the interest should endure up to the time of the action brought, that should have been averred; which has not been usual; and for want of which the judgments in former cases might have been arrested. The hazard was run for which the premium was received, during Mr. Pitt's life; and as he died insolvent, there was then as it were a total loss: then the underwriter's liability cannot be adeemed by the voluntary payment of a third party, though through the hands of the debtor's executors. The very payment of the premium gave the plaintiffs an interest in the policy; and it could not have been in the contemplation of the Legislature when they granted the money for the payment of Mr. Pitt's debts to adeem the risk of underwriters. In the case of insurances against fire, it never was conceived that the insurers could avail themselves *pro tanto* of charitable donations collected for the benefit of the sufferers. In the case of a life insurance, the premium is not calculated upon the risk of the insolvency of the person whose life is insured, but solely on the probability of the duration of the life. But if the defendant's objection be well founded, every case of this sort will be resolved into an examination of the assets; of which the insurers will avail themselves *pro tanto*, after having had the benefit of the whole premium: and this too, at any distance of time when assets may be forthcoming after the payment of the loss. But, secondly, by the payment of money into court the defendants admit a continuance of the

plaintiffs' interest on the policy beyond the amount of the bare debt; for it was paid in after the liquidation of the debt, and after the action commenced. And therefore the plaintiffs would be entitled to recover something. And it does not appear how the premiums received have been reduced to the amount paid into court.

Marryat, *contrà*, said that he should not now dispute the proposition, that a creditor might insure the life of his debtor since the statute; though it might have been doubted, at first, whether such an interest as that in the life of another were within the contemplation of the Legislature. There was an inception of the risk on the policy; and therefore the premium was properly paid; and no question can arise on the amount of it; this being an insurance on a precise sum, like a valued sea policy. The only question is, Whether in the event the plaintiffs have been damnified, and can call upon the assurers for any indemnification. To pursue the metaphor, the ship insured has been wrecked, but there has been a salvage, which the underwriters were entitled to, and out of which the assured have been indemnified; notwithstanding which, they still claim as for a total loss, contrary to the very nature of the insurance, which is only a contract of indemnity. Admitting that the general form of the declaration in these cases may have been such as is stated, still it is competent for the underwriters to show that a salvage has been received by the assured to the whole extent of their loss: and in no case can an assured recover double satisfaction, whether from the same or any other person; as in the case of a double insurance: and therefore it is immaterial in this case from what hand the first satisfaction came. This principle was fully admitted in the case of *Bird* v. *Randall* (*a*), where it was applied to a case much stronger than the present. For there a servant having entered into articles to serve his master for a certain time under a penalty, and the servant having left his service before the time by the procurement of the defendant, this court, in an action by the master to recover damages against the seducer, held that the master's having before sued the servant and recovered the penalty against him before the action brought against the seducer (though in fact the penalty recovered was not received till after the second action commenced, but before trial), was a

(*a*) 3 Burr. 1345; 1 Blac. 373, 387.

bar to such further remedy; considering the amount of the penalty as ample compensation for the injury received; and that no further satisfaction could be received from any other quarter.—[Lord *Ellenborough*, C. J. I never could entirely comprehend the ground on which that case proceeded. It was assumed that the sum taken as the penalty from the servant was the extreme limit of the injury sustained by the master: but there is the doubt: for the penalty might have been so limited, because of the inability of the servant to undertake to pay more; and yet it might have been very far from an adequate compensation to the master for the injury done to him by another who seduced his servant from him. I remember, however, a similar case tried at the sittings in the court of Common Pleas before Mr. Justice *Wilson*, sitting for the Chief Justice, who ruled the same point upon the dry authority of the former decision; but, as it seemed to me at the time, with considerable doubt upon his mind as to the propriety of it.—*Lawrence*, J. I suppose the court proceeded upon the ground that the penalty was, by the express stipulation of the parties, made an equivalent for the loss of the service.—Lord *Ellenborough*. That is so as between the parties themselves; but it may admit of doubt, whether that were the fair way of considering it as against a stranger, a wrongdoer.] A voluntary payment of another's debt, if accepted as such, will protect the debtor; and if so, it will equally protect an insurer, under the statute. For the object of that was to prevent wager policies: but if this policy may be enforced, notwithstanding payment of the debt, every creditor may gamble upon the life of his debtor by way of insurance, though without any reason to doubt of his solvency; and upon his death he would be entitled to double satisfaction of his debt. If a payment out of the debtor's assets would have been a bar to this action, it cannot enter into the merits of the case to inquire by whose assistance the executors have been enabled to make the payment. The money was paid by them and received by the plaintiffs, as for the *debt* of Mr. Pitt. Then, 2dly, the payment of money into court on the first count only admits the contract declared on. It admits that the plaintiffs had an interest in the policy up to the death of Mr. Pitt, but not at the time of the action brought: and where a demand is illegal

on the face of it, payment of money into court does not admit it (*a*). [It was afterwards stated by the court, and agreed on all hands, that the payment of money into court on the first count only admitted the *facts* stated in that count.]

(*a*) *Cox* v. *Parry*, 1 Term Rep. 464; and *Ribbans* v. *Crickett*, 1 Bos. & Pull. 264.

Dampier, in reply, on the principal question, said that the facts of the case showed that this was not a wagering policy; but that the plaintiffs had an interest in it up to the extent of the sum insured. And he denied that the subsequent payment of the debt out of the grant of parliament was like the case of salvage on a marine policy; for that was an advantage calculated upon by the underwriters in fixing the amount of the premium; but here the solvency of the debtor formed no basis of the calculation, but only the probable duration of his life. In *Bird* v. *Randall* (besides the doubt of the soundness of that decision), the penalty was considered as liquidated damages to the full extent of the injury: and the judgment recovered was considered as a satisfaction in law. If, in this case, the plaintiffs, after recovering judgment against the underwriters, had attempted to sue Mr. Pitt's executors, the cases would have been more like. This stands as the case of a *gratuitous* payment by third persons of the debt of another, and not as the satisfaction of a legal demand, nor upon a stipulation to receive it as satisfaction of the present claim. It is most like the case of a charitable donation to sufferers by fire who were partially insured.

Curia adv. vult.

Lord *Ellenborough*, C. J., now delivered the judgment of the court.

This was an action of debt on a policy of insurance on the life of the late Mr. Pitt, effected by the plaintiffs, who were creditors of Mr. Pitt for the sum of 500*l.* The defendants were directors of the Pelican Life Insurance Company, with whom that insurance was effected. [His Lordship, after stating the pleadings and the case, proceeded—] This assurance, as every other to which the law gives effect (with the exceptions only which are contained in the 2d and 3d sections of the stat. 19 Geo. 2, c. 27), is in its nature a contract of *indemnity*, as distinguished from a contract by way of *gaming* or *wagering*. The interest which the plaintiffs had in the life of Mr. Pitt,

was that of creditors; a description of interest which has been held in several late cases to be an insurable one, and not within the prohibition of the stat. 14 Geo. 3, c. 48, s. 1. That interest depended upon the life of Mr. Pitt, in respect of the means, and of the probability, of payment which the continuance of his life afforded to such creditors, and the probability of loss which resulted from his death. The event, against which the indemnity was sought by this assurance, was substantially the expected consequence of his death as affecting the interests of these individuals assured in the loss of their debt. This action is, in point of law, founded upon a supposed damnification of the plaintiffs, occasioned by his death, existing and continuing to exist at the time of the action brought: and being so founded, it follows of course, that if, before the action was brought, the damage, which was at first supposed likely to result to the creditors from the death of Mr. Pitt, were wholly obviated and prevented by the payment of his debt to them, the foundation of any action on their part, on the ground of such insurance, fails. And it is no objection to this answer, that the fund out of which their debt was paid did not (as was the case in the present instance), originally belong to the executors, as a part of the assets of the deceased: for though it were derived to them *aliundè*, the debt of the testator was equally satisfied by them thereout; and the damnification of the creditors, in respect of which their action upon the assurance contract is alone maintainable, was fully obviated before their action was brought. This is agreeably to the doctrine of Lord *Mansfield* in *Hamilton* v. *Mendes*, 2 Burr. 1210. The words of Lord *Mansfield* are, "The plaintiff's demand is for an *indemnity:* his action then must be founded upon the nature of the *damnification*, as it really is at the time the action is brought. It is repugnant, upon a contract for indemnity, to recover as for a total loss, when the event has decided that the damnification in truth is an average, or perhaps no loss at all." "Whatever undoes the damnification in the whole, or in part, must operate upon the indemnity in the same degree. It is a contradiction in terms, to bring an action for *indemnity*, where, upon the whole event, *no damage* has been sustained." Upon this ground, therefore, that the plaintiffs had in this case no subsisting cause of

action in point of law, in respect of their contract, regarding it as a contract of *indemnity*, at the time of the action brought, we are of opinion that a verdict must be entered for the defendant on the first and third pleas, notwithstanding the finding in favour of the plaintiffs on the second plea.

Insurance, whether of ships, lives, or against fire, is a contract of *indemnity*, and whenever an attempt is made to make it answer any other purpose, such an attempt tends to divert it from its original and legitimate object, which renders it the more extraordinary that contracts so plainly wresting it from its proper sphere as *interest or no-interest* policies, should ever have been recognized by law. That, however, they were so, is certain; though they were so far discouraged as inconsistent with sound principle, that unless a policy was expressly stated to be made *interest or no interest*, it was understood that the insured was interested, and he was, in case of loss, bound to prove it. See *Lucena* v. *Crawford*, 3. B. & P. 101. *Sadlers' Co.* v. *Badcock*, 2 Atk. 556. However, *wager policies*, as they are called, are now forbidden to be made on ships, by 19 G. 3, c. 37, and upon other matters by 14 G. 3, cap. 48, which enacts, "that no insurance shall be made by any person or persons, bodies politic or corporate, *on the life or lives of any other person or persons, or on any other event or events whatsoever*, wherein the person or persons for whose use, benefit, or on whose account such policies shall be made, shall have no interest, or by way of gaming or wagering; and every insurance made contrary to the true intent and meaning hereof, shall be null and void to all intents and purposes."

By sec. 2, the name of the person interested therein, or for whose use, benefit, or on whose account, the policy was made, is to be inserted in it.

By sec. 3, in all cases where the insured had an interest in the life or lives, event or events, no greater sum shall be recovered than the value of that interest.

By sec. 4, marine insurances are exempted from the operation of this latter act; and as the act 19 G. 3, c. 37, which governs them, does not require the name of the person really interested to be inserted in a marine policy, it is not necessary that it should be so.

This act does not extend to prevent individuals from effecting insurances *upon their own lives*, provided that be done *bonâ fide*. But it seems that a man would not be permitted to evade the statute by procuring one in whose life he had no legal interest, to insure it with his money and for his benefit, though ostensibly for the advantage of the party insuring. *Wainwright* v. *Bland*, 1 Moo. & Rob. 481, 3 C. M. & Rosc. 32. Still, it has been held, that, where a life-policy is *assigned*, it is not necessary that the assignee should have any interest, or even that he should have paid any consideration; for he stands upon the rights of the party who effected the insurance, and the statute only applies to the original parties to the policy, not to their assignees. *Ashley* v. *Ashley*, 3 Simons, 149.

The statute does not apply, as has been seen, merely to life-policies, but to policies "*on any other event or events whatsoever*." And so sweeping are these words, that it is perhaps not very easy to say precisely what description of wager, if reduced to writing, might not be invalidated by them. In *Roebuck* v. *Hamerton*, Cowp. 737, (which was the first case decided on this statute,) the defendant, in consideration of a certain sum, undertook to pay the plaintiff a greater sum, in case *Monsieur le Chevalier D'Eon* should at any time prove to be a female. At the trial the point was reserved, whether this wager was prohibited by st. 14 G. 3, c. 48, and the court held that it was so. It must be observed,

that in this case the wager was drawn up in the form of a policy, and was indorsed as one, and opened to any number of persons who pleased to subscribe. In *Paterson* v. *Powell*, 9 Bingh. 320, the declaration was upon the following instrument: —

"In consideration of forty guineas for 100*l.*, and, according to that rate, for every greater or less sum received of
we, whose names are hereunto subscribed, do, for ourselves severally, and our several and respective heirs, executors, administrators, and assigns, and not one for the other or others of us, or for the heirs, executors, &c. of the other or others of us, assume and promise, that we respectively, or our respective heirs, executors, &c. shall pay or cause to be paid to the said , the sum or sums of money which we have hereunto respectively subscribed, without any abatement whatever. In case the Imperial Brazilian Mining shares be done at or above 100*l.* per share on or before the 31st day of December, 1829.

100*l.* James Powell, One hundred pounds, 29 April, 1829.
100*l.* Henry Hodges, do.
100*l.* A. P. Johnson, do.

The court held this instrument void, as a policy prohibited by the statute. The Lord *Chief Justice* remarked, "that it had been contended, that the words of the act were confined to cases where there was *a subject-matter of insurance exposed to peril;* but that that argument was inconsistent with the words *any event or events whatsoever*:" and his lordship cited, on that subject, the case of *Mollison* v. *Staples*, 1 Park Ins. 140 n., where a policy on the event of there being an open trade between Great Britain and Maryland on or before July 6, 1778, was held void by Lord *Mansfield*. "Our decision," continued his lordship, "therefore, must turn upon the provisions of the 14 G. 3., *if this instrument can be deemed a policy*. Upon that point we entertain no doubt. Here is a premium paid, in consideration of the insurers incurring the risk of paying a larger sum upon a given contingency. The instrument is open to all who may choose to subscribe, that is, without restriction of persons or numbers. It then proceeds, in the usual language of policies of insurance—'We respectively will pay, or cause to be paid, to the sum and sums of money which we have hereunto respectively subscribed, without any abatement whatever, in case, &c.' If the instrument in *Roebuck* v. *Hamerton* was rightly held to be a policy, I can make no just discrimination between that instrument and the present. It is true, that the policy contains no clause about average, because the circumstances of the risk do not require it. But, if the instrument can be deemed a policy without that clause, we should impair the efficacy of the act of parliament, if we were to consider it as an ordinary contract. I cannot consider it as other than a policy, and if so, the plaintiff's claim must receive the same answer as was given by Lord *Mansfield*, in *Roebuck* v. *Hamerton;* first, that this is an insurance on an event in which the party had no interest; or if he had, the policy does not disclose the name of any party interested."

On the other hand, it is too late to contend that there may not be many legal wagers. And there are instances in which the courts have refused to apply to such the provisions of the statute in question; thus, in *Good* v. *Elliott*, 3 T. R. 693, the action was upon a wager between the plaintiff and defendant, whether Susannah Tye had bought a certain wagon from David Coleman. The declaration stated the nature of the transaction; and, after verdict for the plaintiff, a rule *nisi* was obtained to arrest judgment, but was discharged by the court (*dissentiente Buller*, J.) after an elaborate discussion of the entire subject. The majority of the judges relied upon several decided cases, as proving that all wagers were not necessarily void at common law, but only those which, by injuring a third person, disturb the peace of society, or which militate against the morality or sound policy of the kingdom; and they remarked, that had the law been otherwise, there would have been no occasion for passing st. 14 G. 3 at all. They then proceeded to consider the question, whether the transaction was invalidated by that statute, and concluded that it was not. "The statute," said Mr. J. *Grose*, "evidently meant that every

assurance on lives, or on any other *event*, in which the assured has not an interest, shall be void, *whether such interest be effected in the form of a policy, or by way of gaming or wagering.* And if the construction contended for by the defendant be the true one, it leads to this extraordinary proposition, *viz.*, that a statute which concerns every part of the community, and which was passed in 1774, has never been understood by any one till 1790. To say that every wager is prohibited by this statute, is to say, that every wager is an *insurance*; and that the parliament meant to describe a wager by calling it an insurance, which I am of opinion was not their intent." Lord *Kenyon*, in his judgment, further remarked, that it was apparent that the legislature had *written instruments* only in contemplation, by requiring the names of the parties interested to be inserted therein.

It will be observed, that the majority of the judges in *Good* v. *Elliott* seem to have considered the distinction between cases within, and cases not within, the meaning of the statute, to consist rather in the *nature of the risk*, than in the form (provided it be written) of the contract. Indeed, the construction put upon the act by *Grose*, J., is irreconcilable with any other view; for his lordship, commenting on the statute, says (as is above cited), "The statute meant, that every *assurance* on lives, *or on any other event*, in which the assured had not an interest, should be void, *whether such insurance be effected in the form of a policy*, or *by way of gaming or wagering*;" manifestly intending to express his opinion, that there were two ways of effecting an insurance, the one *in the form of a policy*, the other *by way of gaming or wagering*—that is, *in the form of a bet*; but that, whichever way was adopted, the insurance would equally be void, if the insured has no interest in the subject-matter of insurance. And certainly that construction of the act appears rational; and there may be something not quite in accordance with common sense, in saying that a statute prohibiting a contract can be evaded by shaping the contract in one form rather than another. Now, if that construction of the statute be the true one, and if insurances be void, though in the form of *wagers*, not of *policies*, the next question will be—*what wagers are, in nature and in substance, insurances, as contradistinguished from mere bets?* and this question, too, seems to be answered by Mr. J. *Grose*, who, using the very words of the statute, says, that it evidently intended insurances upon *events*. Now an *event*—that which will *eventually* happen (*evenire*), seems to include the uncertain—uncertain, because future—issue of any transaction whatever. To give the word *event* used in the act, that sense, and to construe every wager *on an event* to be a *policy*, would have the effect of dividing all *written wagers* into two classes:—1. Wagers upon questions capable of solution *in præsenti*.—2. Wagers upon questions incapable of solution *in præsenti*, or *events*. For instance, under the former class would fall a wager whether a particular horse is black or white, since the colour of the horse *is* an existing fact; under the second class, a wager, whether the foal a mare now goes with *will* be black or white, as that is a wager upon an *event*. But if such really were the distinction between cases comprised and those not comprised by the statute, it would be a very thin one indeed; for, after all, if two men lay a bet upon a matter, the truth of which is presently ascertainable, although the thing either *is*, or *is not*, as is asserted, and therefore its *status* cannot, with reference to the general nature of things, be *an event*; still, as the betters are themselves uncertain how the truth will upon examination be discovered to be, *their discovery* of the true state of things is *an event*, although the thing discovered itself is not. And the distinction would indeed be a fine one, which should consist in the difference between a wager on a future thing, and a wager on the future discovery of an existing thing. But, without adopting this distinction, it is impossible to escape from the conclusion, *that the application of the act is to those written contracts only which are in the form of policies; or, to go a little further, that if it do apply to any other contracts, it at all events applies only to such as are ordinarily, and in the common course of business, made by way of policy, though the parties may, for the purpose of evading the statute, have*

framed them in the shape of wagers. That the class of cases comprehended within the latter part of the above proposition, should be within the provisions of the act, seems but reasonable. For the former part of the proposition there is great authority.

And, first, there is authority to prove, that all wagers, *if conceived in the form of policies*, are within the statute. In *Roebuck* v. *Hamerton*, the wager was not upon an *event*, in the strict sense of that word; but on an existing, though unascertained fact, the sex of the *Chevalier D'Eon*. It is true, that in the other sense above suggested, treating the discovery as the event, it was on *an event;* for the words were, "*in case the Chevalier should at any time prove a female.*" But Lord *Mansfield*, although the distinction between *existing facts* and *future events* was taken at the bar, founded his judgment not on that distinction, but on the *form* of the contract. "The parties themselves," said his lordship, "have called it a policy. It is indorsed as a policy, opened as a policy, and any number of persons whatever might have subscribed it as such; therefore, it is clearly within the act."

In the case of *Paterson* v. *Powell*, cited at the beginning of the note, the court, as will be seen on reference to the extracts above made from the judgment of the Lord *C. Justice*, relied particularly upon the form of the contract, which was that of a policy.

On the other hand, it is clear, as has been said, from *Good* v. *Elliott*, that it is not every *wager* which is an *insurance* within the meaning of the act. In *Good* v. *Elliott*, the wager, it is true, was not upon an *event;* but we have seen already how thin the distinction is between a wager on a future circumstance, and a wager on the future discovery of a present but *unknown* one. In the late case of *Morgan* v. *Pebrer*, 3 Bingh. N. C. 454, the impression of the court appeared to be, that a wager on a future event, if not conceived in the shape of a policy, would not necessarily fall within the statute. It was an action of *assumpsit;* and the declaration stated, that in consideration that the plaintiffs would, at the defendant's request, purchase 10,000*l.* of *Cortes Bonds*, and 30,000*l. Spanish Scrip*, the defendant promised to indemnify them against loss in a particular manner, which he had neglected to do. *Plea*, that the contract was for the purchase of public securities, to be delivered on a future day, and was in truth a wager on the price of Spanish securities, by which the plaintiffs, as brokers for the defendant, agreed with certain persons, that if the price of the said securities should be higher on a certain future day, the defendant should receive the difference; if lower, should pay the difference. *Demurrer*, on the argument of which it was decided, in accordance with *Henderson* v. *Bise*, 1 Stark, 158; *Wells* v. *Porter*, 2 Bingh. N. C. 722; *Oakley* v. *Rigby*, *ibid.* 732; *Elsworth* v. *Cole*, 2 Mee & Welsb. 31; and *Robson* v. *Fallows*, 2 Bingh. N. C. 332, that time bargains in foreign securities are not void by the Stock-Jobbing Act. But, though that was the principal point, it was also submitted to the court by Mr. *Gale*, who argued for the defendant, that the contract was a gaming policy, void by the 14 G. 3, and *Paterson* v. *Powell* was cited. Upon this point the Lord *Chief Justice* said, "As to the statute 14 G. 3, c. 48, there is no case which has treated a simple wager as within the enactments against wagering policies on lives; and I cannot see how a simple wager, unobjectionable upon other grounds, can be said to fall within this statute, when it does not even assume the form of a policy of insurance." The observations of the rest of the court were equally strong, and it was expressly stated by Mr. J. *Vaughan*, that Lord *Kenyon* and Mr. J. *Grose* had both laid it down, "that the statute did not apply, *except in the case where the wager assumed the shape of a policy of insurance.*"

It must, however, be observed on *Morgan* v. *Pebrer*, that it does not seem to have been *necessary* in that case to decide the point, whether a wager on a future event, not conceived in the usual shape of a policy, be within the meaning of the act, or no? For it did not sufficiently appear from the record that the parties were not *interested* in the event. On the contrary, it rather appeared that they were so; for, though they were not possessed of the Spanish Stock, still, if a contract to buy

foreign stock at a future day, or else pay the difference between its then and present price, be not illegal as a time-bargain within the Stock-jobbing Act, then it is clear that the party making such a contract *has* an interest in the eventual price, and, if so, the case cannot fall within the 14 G. 3. There is another ground on which this case may possibly be exempted from the operation of the statute. Lord *Kenyon*, it will be remembered, seemed to think that the act only applied to *written contracts*. Now there was no averment in any part of the record in *Morgan* v. *Pebrer*, that any part of the contract there was *in writing*. Whether Lord *Kenyon's dictum* on that subject may be hereafter acquiesced in, is another question. Certainly it would be strange if a *gaming policy*, prohibited from being made in writing, could be good if made by *parol*, and the effect of that clause in the statute which directs that the name of the party interested shall be inserted, may perhaps be, not to render a policy good if verbal, which would be bad if written, but to render a writing necessary in every case.

Notwithstanding the strong expressions used by the court in *Morgan* v. *Pebrer*, which, according to the well-known rule, must be referred to the case then before them, it is extremely difficult to suppose, that if, in any of those transactions on which policies are usual, a gaming policy were worded like a common wager, it would be held to be thus exempted from the operation of the 14 G. 3.

To such cases the expressions of Lord *Mansfield*, in *Foster* v. *Thackery*, cited by *Buller*, J., in *Good* v. *Elliott*, would forcibly apply. "What," said his lordship, "is a policy? It is derived from a French word which means a *promise*. Is a particular form necessary? Must it begin, 'In the name of God, amen?' or refer to Lombard Street? A *mercantile policy* we all know, but a *gaming policy* is a mere wager. If the form were essential under the act, it may be evaded immediately; for it may begin, 'We promise, if war be declared, we will pay,' &c. Apply that to mercantile affairs: 'We promise, if the ship sails, and does not arrive, &c.'" Perhaps few readers have perused the admirable judgment of Mr. J. *Buller*, in the case of *Good* v. *Elliott*, without feeling regret that his construction of the act was not adopted, and all idle wagers whatever held to be invalidated by it.

With respect to the nature of the *interest* which the statute requires, Lord *Tenterden*, in *Halford* v. *Kymer*, 10 B. & C. 725, expressed a strong opinion that it must be *a pecuniary one*. A policy effected by a father, in his own name, on the life of his son, was, in that case, held void. "It is enacted," said *Bayley*, J., "that no greater sum shall be recovered than the *amount of the value* of the interest. Now what was the *amount of the value* of the interest in this case? Certainly not one farthing. If a father, wishing to give his son some property to dispose of, make an insurance on his son's life, in his (the son's) name, not for his (the father's) own benefit, but for the benefit of the son, there is no law to prevent his doing so; but that is a transaction quite different from the present." A creditor (as is well known) has an insurable interest in the life of his debtor, *Anderson* v. *Edie*, Park. Ins. 640; unless, indeed, the debt be an illegal one. *Dwyer* v. *Edie*, Park. 639. A trustee may insure in respect of the interest of which he is trustee, *Tidswell* v. *Angerstein*, Peake 151. Lord *Kenyon* held, at *Nisi Prius*, that a wife, who had insured her husband's life, need not prove she was interested in it, for it must be presumed, *Reed* v. *Royal Exchange Assurance Co.*, Peake Add. Ca. 70. It has been always considered clear that a man may insure his own life; but, as has been already observed, the Court of Exchequer has expressed an opinion, in *Wainwright* v. *Bland*, that a man cannot, in order to evade the statute, legally insure his own life with the money and for the benefit of another. Indeed, there would be another objection to such a proceeding, arising from sec. 2 of the statute, which requires the insertion of the name of the person on whose account the policy was underwritten.

The principal case of *Godsall* v. *Boldero* did not indeed turn on the statute of 14 G. 3, but on the common-law doctrine, that insurance is a contract of indemnity. The act applies to cases where there never was an interest to insure; the common-law doctrine to cases where

there was an interest, but the insured has been indemnified without the aid of the insurers.

The doctrine established by *Godsall* v. *Boldero*, as applicable to such cases, is recognised in *Ex parte Andrews in re Emett*, 1 Madd. 573. Stephen Emett had assigned a contingent interest, determinable on the death of his wife Margaret, to his brothers, Thomas and Charles, to secure debts from him to them. They had each insured the life of Margaret, and on her death received 200*l.* from the office. Stephen Emett afterwards becoming bankrupt, they proved their whole debt, without deducting the 200*l.*, and the question was, whether so much of the proof should be expunged. "Upon the argument," said the Vice-Chancellor, Sir *Thomas Plumer*, "this case was assimilated to *Godsall* v. *Boldero*, of which it is the converse. Here the party recovered not his debt, but the sum insured by the policy. But, it is said that, inasmuch as in that case the transactions were blended, and what was paid by the executors absolved the office, so payment by the office discharges the debt. It may be argued, however, that it does not necessarily follow that the court deciding that the party, having been paid by the executors, could not recover from the office, would have decided that having been paid by the office, he could not recover from the executors. The contract with the insurance office must be a contract of *indemnity;* it would be legal only as an indemnity commensurate with the interest of the party. The contract is to indemnify from loss; but there was no loss. That case, therefore, though it bears on this question, does not conclude it." *Ex parte Andrews* was decided on another point. The observations of the Vice-Chancellor, in that case, are fully borne out by the decision of the Court of Queen's Bench in *Clark* v. *Blything*, 2 B. & C. 254, which settles that the converse of *Godsall* v. *Boldero* does not hold good. That was an action to recover satisfaction from the hundred for stacks wilfully burnt. It appeared that they had been insured, and that the plaintiff had received the amount of the loss from the office. The court, however, held, that he was entitled to recover. The same point had been previously decided in *Mason* v. *Sainsbury*, 2 Marshall on Insurance, 796.

There is a case reported in 6 Esp. 11, *Holland* v. *Smith*, decided by Lord *Ellenborough*, from which it may be conjectured that his lordship was of opinion, that if A insure the life of B, his debtor, and afterwards the debt is paid off, B may, by continuing to pay the premiums, keep the policy alive for his own benefit. In that case, O'Hara, being indebted in 50*l.* to Kendrick, the latter insured his (O'Hara's) life to that amount. The debt was paid off, and O'Hara's executor afterwards sued Kendrick's executor for the amount of the insurance, which had been received by the latter from the office, and having proved that O'Hara had regularly repaid Kendrick the amount of premiums paid by the latter to the office, he was held entitled to recover, his lordship saying, that "it must be taken that O'Hara meant to keep the policy alive for his own benefit. It is, however, clear from *Godsall* v. *Boldero*, that Kendrick's executor could not have recovered against the office; and as O'Hara's executor must, if he had sued the office, have sued in the name of Kendrick's executor, it would be strange if his rights were more extensive. It must, however, be observed, that the question of the rights of either executor against the office, was by no means *necessarily* involved in this case, which only decides that Kendrick's executor was not entitled to the money *as against* O'Hara's executor, but must be taken to have received it as the latter's agent.

There is a question which has been occasionally mooted, but on which I am not aware of any express decision, *viz.* whether, if a man having an interest in the life of another, were to insure it, and the interest were afterwards to cease, and after that, he were to acquire a fresh interest, the policy would be available to protect that fresh interest. On the one hand it may be urged, that the interest originally insured has been determined by the payment; that the policy is thereby satisfied; and that, to make it cover a new interest, would be to create a new risk, against which the office never contracted to insure. On the other hand it may be argued, that

all that the statute and common law, taken together, require, is, that a party should not insure a life in which he has no interest, and that he should not recover money which he has actually been paid. That, in the case put, the former condition is satisfied by there being an interest at the time of the insurance ; the latter, by there being an interest at the time of the death; that what may happen in the intermediate space of time is immaterial ; and that the insurance office is not aggrieved, having demanded and received the premium on the supposition that the original interest would continue until the expiration of the life insured.

As the insurance is a *contract of indemnity*, it follows, from the same principle on which *Godsall* v. *Boldero* was decided, that if *part* of a debt be paid by the debtor or his executors, the insurers will be relieved *pro tanto*. On this ground stands the decision in *Irving* v. *Richardson*, 1 M. & Rob. 153, which arose on a sea policy. The defendant had insured 1,700*l.* with a Glasgow Company, and 2,000*l.* with the *Alliance* office, on the ship *Swiftsure*, valued in both policies at 3,000*l.*: he received both sums, the Alliance not being, when they paid, aware of the former insurance. The Alliance afterwards brought an action to recover back 700*l.*, being the excess of the amount paid above the value declared, and Lord *Tenterden* held them entitled to recover, the defendant being bound by the valuation in the policy, though the vessel was really worth 3,700*l.* In *Bousfield* v. *Barnes*, 4 Camp. 228, however, the values declared were 6,000*l.* in one policy, and 8,000*l.* in another ; and the insured was permitted to recover 600*l.* upon the former policy, though he had already recovered 6,000*l.* on the latter.

ROSE *v.* HART.

TRINITY, 58 *G.* 3.—*C. P.*

[REPORTED 8 TAUNT. 499.]

Trover for cloths deposited by the bankrupt previously to his bankruptcy with the defendant, a fuller, for the purpose of being dressed: Held, that the defendant was not entitled to detain them for his general balance for such work done by him for the bankrupt previously to his bankruptcy; for that there was no mutual credit within stat. 5 *G.* 2, *c.* 30, *s.* 28.

TROVER for cloths deposited by the bankrupt, previously to his bankruptcy, with the defendant, who was a fuller, for the purpose of being dressed. At the trial, before *Holroyd*, J., at the Salisbury Spring assizes, 1817, it appeared that when the cloths were so deposited, there was a debt due from the bankrupt to the defendant, for other cloths dressed by the latter. After the bankruptcy, the plaintiffs tendered the sum due for dressing the cloths in question to the defendant, who refused to deliver them up, without payment of the whole debt due to them from the bankrupt. They then brought their action. For the defendant it was contended, that the case came within the principle laid down in *Olive* v. *Smith* (*a*), and that he was entitled to retain the cloths for his general balance. The jury found a verdict for the plaintiffs; and, *Holroyd*, J., having reserved the point,

(*a*) 5 Taunt. 56.

Pell, Serjt., in Easter term, 1817, moved for a rule *nisi* to set aside the verdict and enter a nonsuit, on the ground urged at the trial, and he cited *Ex parte Deeze* (*b*), as in point, and observed, that the principle of the cases which contradicted the doctrine there laid down was vicious, inasmuch as it went to destroy the law of lien.

(*b*) 1 Atk. 228.

Gibbs, C. J.—You are aware of the case of *Green* v. *Farmer* (*a*), which, by the bye, I may say has been frequently disregarded. In a case in which I have the brief, and in which case Lord *Ashburton* was, a special custom for dyers to have their general lien was proved; and, notwithstanding *Green* v. *Farmer*, that custom was acted upon in that case, and has been many times since recognised. The case *Ex parte Deeze* is certainly contradictory to the case *Ex parte Ockenden* (*b*), subsequently decided. The question is of the utmost importance, and we are quite open to hear it discussed. Take your rule. Rule *nisi* granted.

(*a*) 4 Burr. 2214.

(*b*) 1 Atk. 235.

In the following Trinity term cause was shewn by *Lens*, Serjt., who contended, that Lord *Hardwicke*, in *Ex parte Ockenden*, recognised by *Mansfield*, C. J., in *Green* v. *Farmer*, had much narrowed the extensive construction which he had put in *Ex parte Deeze*, on the words "mutual credits," in the stat. 5 G. 2, c. 30, s. 28, and had excluded cases like the present from its operation; and referred to the case of *Chase* v. *Westmore* (*c*), where a point similar to the present was made, but the court, thinking that that case did not involve the question of mutual credits, gave judgment on the point of lien. He also cited *Birdwood* v. *Raphael* (*d*), and contended, that the decision in *Olive* v. *Smith* did not apply to the present case.

(*c*) 5 M. & S. 180.

(*d*) 5 Price, 593.

Pell was then heard in support of the rule. If the defendant had sold these cloths, and the assignees had brought their action for money had and received, they must clearly have allowed to the defendant the amount of their general balance against the bankrupt, before they could have recovered the difference, if any, from the defendant. Mutual credit is used as synonymous with mutual trust. "Where there is a trust between two men, on each side, that makes a mutual credit (*e*)." The case *Ex parte Deeze*, and the whole reasoning of Lord *Hardwicke* on the subject of mutual credit in that case (which is recognised and confirmed in *French* v. *Fenn*, in *Smith* v. *Hodson* (*f*), and both by *Gibbs*, J., in his statement of his opinion at the trial in *Olive* v. *Smith* (*g*), and subsequently, by the whole court, in their final decision), is most strong for the defendants; but, if the case *Ex parte Ockenden*, in which no judgment was given, is to be upheld against the case *Ex parte Deeze*, confirmed

(*e*) *Per Buller*, J., *French* v. *Fenn*, Co. B.L. 536, 7th ed.

(*f*) 4 T.R. 211.

(*g*) 5 Taunt. 58.

over and over again by subsequent decisions, then it is admitted, that the defendants cannot succeed.

It is true, that this is an action of trover, and no case of this precise nature has been decided; but the plaintiffs, by their choice of action, can never prevent the defendant from having the benefit of this statutable lien. In *Jennings* v. *Rundall* (*a*), the plaintiff shaped his case in tort, in order to deprive the defendant of the benefit of his infancy; but the defendant pleaded his infancy, and it was holden a good plea. In *Ex parte Deeze*, Lord *Hardwicke* says, "It is very hard to say that mutual credit should be confined to pecuniary demands, and that if a man has goods in his hands belonging to a debtor of his, which cannot be got from him without an action at law or bill in equity, it should not be considered a mutual credit." "There have been many cases which the clause of the act has been extended to, where an action of account would not lie, nor could this court, upon a bill, decree an account." These strong expressions acquire double strength, when the judgment of *Mansfield*, C. J., in *Olive* v. *Smith*, is referred to. "I should have thought that the words of the statute meant only money transactions; but if the extension of mutual credit be, as it has been contended, a mistaken doctrine, the mistake is so deeply rooted, that it would be rash to overturn it; and there is a great deal of justice in the determination, at which, not only the Court of King's Bench, but the Court of Chancery, have arrived on this point." This is hardly saying less, than that the statute extends to cases of trover, and the whole judgment lays down the rule of extension on the broadest ground; a rule resting as much on sound law as it does on justice. [*Burrough*, J. Is it the true meaning of the act, to extend the doctrine of mutual credit to cases where the goods are not ultimately to be turned into money?—*Dallas*, J. Where the goods are specifically to remain as goods?] Lord *Hardwicke*, in *Ex parte Deeze*, expressly goes on that ground. [*Burrough*, J. In *Lanesborough* v. *Jones* (*a*), which was a decision on stat. 4 Anne, c. 17, s. 11, the judgment of Lord Chancellor *Cowper* went on the ground that there was a plain mutual credit.] In *French* v. *Fenn*, if trover had been brought, it must have been brought on the same ground on which it may be brought here. [*Burrough*, J. No. In *French* v. *Fenn*, the

(*a*) 8 T. R. 335.

1 Peere Wms. 325.

pearls were sent out on an express contract to be sold, and, though the sale was after the bankruptcy, the contract was before the bankruptcy.] In *Smith* v. *Hodson*, the assignees might have brought trover; and the whole judgment in that case goes to show that if the action had been so shaped the assignees might have recovered. [*Gibbs*, C. J. The judgment of the court, in *Smith* v. *Hodson*, as to the probable success of the assignees, if they had brought trover, goes on the ground of fraud and undue preference, with which that case was tinctured.] The language of the courts, in *Ex parte Deeze*, *French* v. *Fenn*, and *Olive* v. *Smith*, is clear to shew that the form of action can make no difference; and the plaintiffs are not to be shut out from the benefit of the rule so broadly laid down and so strongly confirmed, because this is the first action for trover for goods in specie, on which the point has arisen.

Cur. adv. vult.

And now, the case having stood over till this day,

Gibbs, C. J., delivered the judgment of the court.

This was an action of trover for cloths left by Smart before his bankruptcy, with the defendant, who was a fuller, to be dressed.

There was then a balance due from the bankrupt to the defendant for work done on other cloths.

The assignees tendered to the defendant the sum due for work done on the cloths in his possession, and demanded them from him; but the defendant refused to deliver them up, unless he was paid his general balance.

The question was, Whether he were entitled to retain them for that balance? And Mr. Justice *Holroyd*, before whom the cause was tried, at the Spring assizes for Salisbury, 1817, reserved the point for the opinion of the court; and we are of opinion that the defendant, who received these cloths for the purpose of dressing only, had no right to detain them for his general balance.

He founds his claim on the ground of mutual credits, mentioned in stat. 5 Geo. 2, c. 30, s. 28, and the construction which has been put upon that statute.

The case *Ex parte Deeze* (*a*) is not distinguishable from the present. There, a packer claimed to retain goods, not only for the price of packing them, but for a sum of 500*l.*,

(*a*) 1 Atk. 228.

lent to the bankrupt on his note; and Lord *Hardwicke* determined that he had such right, on the ground of mutual credits, to which he gives a very extensive effect, and says, that the clause relative to them has always received a very liberal construction.

This doctrine, if it were supportable, would apply directly to the present case, and would establish the defendant's right to retain for his general balance.

But, in the case *Ex parte Ockenden*, which came before Lord *Hardwicke* about six years after the former, he very much narrows the extensive construction that he had before put on the words "mutual credits," in the statute 5 Geo. 2, c. 80, s. 28, and determines, in express terms, that a case like the present does not fall within them.

That the cases *Ex parte Deeze* and *Ex parte Ockenden* are accurately reported by Atkyns, we have the authority of Lord *Mansfield*, in *Green* v. *Farmer* (*a*), who confirms them by his own notes.

(*a*) 4 Burr. 2222.

It appears, therefore, that the final opinion of Lord *Hardwicke*, after a very full consideration of the subject, would exclude the present case from the protection of the statute as a mutual credit, though he admits that the words mutual credits have a larger effect than mutual debts, and that under them many cross claims may be allowed in cases of bankruptcy, which in common cases would be rejected.

I am not aware of any later decision upon this subject, until the case of *French and another, assignees of Cox*, v. *Fenn*, which occurred in the year 1783, and is very fully and correctly reported in Cooke's Bankrupt Laws (*b*).

(*b*) 536, 7th ed.

Cox, the bankrupt, was indebted to Fenn, and had entrusted him with his share or interest in a string of pearls, to be sold by Fenn, and the profit on such share to be paid to Cox. Fenn sold the pearls after Cox's bankruptcy, and Cox's assignees brought an action against Fenn for his share of the profit. On the part of the defendant it was insisted that there was a mutual credit, though not a mutual debt, at the time of the bankruptcy, and that one could not be demanded without satisfying the other.

The doctrine of Lord *Hardwicke*, in *Ex parte Deeze*, was relied on by the counsel, and seemed to be fully adopted by the court, without adverting to the qualification which it received from the case *Ex parte Ockenden;* and, applying

that doctrine to the case before them, they determined, that Fenn was protected from the claim of Cox's assignees, by the clause of mutual credits.

French v. *Fenn* has been followed by a string of causes running through a period of more than thirty years, all professing to depend upon it, some of them containing the fullest approbation of *Ex parte Deeze*, from the Bench.

Whatever I might think of the original decision, I could not persuade myself to break in upon a class of cases so long established; and if they could not be supported without carrying the doctrine found in *Ex parte Deeze* to its fullest extent, speaking for myself, I should be ready to follow it, rather than overturn all that has been settled upon this subject for such a length of time.

But it is first to be considered whether these cases may not be supported by a construction of the statute, which will not go to that extent, and will leave the opinion of Lord *Hardwicke* in the case of *Ex parte Ockenden* untouched.

By the 28th section of 5 Geo. 2, c. 30, it is enacted, "that where it shall appear to the said commissioners or the major part of them, that there hath been *mutual credit* given by the bankrupt, and any other person, or *mutual debts* between the bankrupt and any other person, at any time before such person became bankrupt, the said commissioners or the major part of them, or the assignees of such bankrupt's estate, shall state the account between them, and *one debt* may be set against another; and what shall appear to be due on either side, on the balance of such account, and on setting such *debts* against one another, and no more, shall be claimed on either side respectively."

Something more is certainly meant here by *mutual credits* than the words *mutual debts* import; and yet, upon the final settlement, it is enacted merely that one *debt* shall be set against another. We think this shows that the legislature meant such *credits* only as must in their nature terminate in *debts;* as where a debt is due from one party, and credit given by him on the other for a sum of money payable at a future day, and which will then become a debt; or where there is a debt on one side, and a delivery of property with directions to turn it into money on the other: in such case the credit given by the delivery of the pro-

perty must in its nature terminate in a debt, the balance will be taken on the two debts, and the words of the statute will in all respects be complied with; but where there is a mere deposit of property, without any authority to turn it into money, no debt can ever arise out of it, and therefore it is not a credit within the meaning of the statute.

This principle will support all the cases from *French* and *Fenn* to *Olive* v. *Smith*, which is the last that has occurred.

In *French* and *Fenn* there was a debt due from Cox to Fenn, and Cox entrusted Fenn with his share in the pearls *for sale*, which when sold would constitute a *cross debt* for the produce from Fenn to Cox.

(*a*) 4 T.R. 211.

In *Smith* v. *Hodson* (*a*) the defendant had entrusted the bankrupts with his acceptance, which he was liable to pay, and which when paid would create a debt from the bankrupts to him for the amount.

In *Parker* v. *Carter*, Co. Bankrupt Laws, 548, and *Olive* v. *Smith*, the bankrupts were indebted to the defendants, and the bankrupts delivered policies of insurance to the defendants to collect losses under them, which when collected, would make the defendants *their debtors* for the amount.

So, in all the other cases which have occurred upon this subject, it will be found, that that which has been allowed as a mutual credit has always been of such a nature as must terminate in a *cross debt.*

(*b*) *Dallas*, J., was absent from illness, but concurred in this judgment, *ex relatione Gibbs*, C. J.

To this extent we think the statute may be carried, but no farther; and we follow the final opinion of Lord *Hardwicke*, in determining, that the delivery of these cloths to the defendant, for the purpose of being dressed, does not form an article of mutual credit in his favour within the fair construction of the clause relied on.

See *Sampson* v. *Burton*, 2 Brod. & Bingh. 89, particularly the judgment of *Burrough*, J.; and, in page 96 of that report, for "1818," read "1817."

The *postea* must, therefore, be delivered to the plaintiffs (*b*).

This is the leading case on the subject of *mutual credit.* The prior decisions were, as will have been seen in the text, at variance with one another; and the rule established in *Rose* v. *Hart* has ever since been recognized and acted upon. It was determined after much consideration, for *Burroughs*, J., states, in *Sampson* v. *Burton*, 2 B & B, 89, that the Judges had several meetings upon it.

The doctrine of set-off in bankruptcy is shown by Mr. Christian to have existed

from a very early period, certainly before st. 4 & 5 Anne, c. 17, in which it first received the express sanction of the legislature. See 1 Ch. 499. Anon. 1 Mod. 215; *Chapman* v. *Derby*, 2 Vern. 117. The policy of allowing a set-off between monies due to and from the bankrupt's estate, is precisely the same as that in which the law relative to *stoppage in transitu* originated. It is to prevent one man's debts from being paid with another man's money, which would take place if a man, being at once the debtor and creditor of the bankrupt, was forced to *pay* the whole of his debt to the estate, and to *receive* only a dividend. The enactment in the statute of Anne was followed by a similar one in the temporary act of 5 G. 1, c. 11; then with improvements by 5 G. 2, c. 30, s. 28. None of these acts, however, went further than to allow a set-off upon the accounts existing *at the time of the bankruptcy*. The 46 G. 3, c. 135, s. 3, went further, and extended the right of set-off to cases where the credit was given within two months of the date of the commission, provided the person giving it had not notice of a prior act of bankruptcy, or that the bankrupt was insolvent, or had stopped payment. It was found, however, that even with this extension, cases of great hardship occurred. See *Kinder* v. *Butterworth*, 6 B. & C. 42. It now depends upon st. 6. G. 4, c. 16, s. 50, which enacts, "That where there *has been mutual credit* given by the bankrupt and any other person, or where there *are mutual debts* between the bankrupt and any other persons, the commissioners shall state the account between them, and one debt or demand may be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit given to, or the debt contracted by him; and what shall appear due on either side on the balance of such account, and no more, shall be claimed or paid on either side respectively; and every debt or demand hereby made provable against the estate of the bankrupt, may also be set off in manner aforesaid against such estate, provided that the person claiming the benefit of such set-off had not, *when credit was given, notice of an act of bankruptcy*, by such bankrupt committed.

Notice of the act of bankruptcy is now, therefore, the dividing point at which the right of set-off terminates; and consequently it has been held, that a person who, after bankers had actually stopped payment, industriously collected their notes for the express purpose of setting them off against a debt due from himself to the firm, should be allowed to do so, as he had no notice of any *act of bankruptcy* actually committed by either of the partners. *Dickson* v. *Cass*, 1 B. & Adol. 343, *accord. Hawkins* v. *Whitten*, 10 B. & C. 217. But it was held in the same case, that he could not set off notes which he had taken after he knew that *some* of the partners had committed acts of bankruptcy.

Under this section, there are, it will be observed, two classes of cases in which the right of set-off is expressly given. 1. Where there are mutual debts. 2. Where there have been mutual credits. It is upon the second of the above two classes, that *Rose* v. *Hart* is a leading authority. It is cited whenever the question occurs,—"does a particular state of dealings amount to a *mutual credit* between the bankrupt, and some person claiming to set off a cross demand against his estate?"

The first case, bearing upon this question, was *Ex parte Prescott*, 1 Atk. 230, where the claimant owed the bankrupt a debt, payable *in futuro*, and the bankrupt owed him one payable *in præsenti*. Lord *Hardwicke* said, that this constituted, not indeed a *mutual debt*, but a *mutual credit*. The cases soon multiplied; and it was settled, that, in order to render credits *mutual*, within the meaning of the bankrupt laws, it was not necessary that the bankrupt and the creditor should particularly *intend* to trust each other, or to raise cross demands. This was settled in *Hankey* v. *Smith*, 3 T. R. 507 n., where A.'s acceptance got into B.'s hands, and B. bought goods of A., who did not know that the bill was in B.'s hands.

After Lord *Hardwicke* had, in *Ex parte Prescott*, pointed out the distinction between *mutual debts* and *mutual credits*; the latter term was frequently relied on, and

there was a struggle to bring within its meaning many demands which could not possibly have ranged within the former term. It has been seen from the discussion in the text, that in *Ex parte Deeze*, 1 Atk. 228, these words received a very large construction, which was narrowed by *Ex parte Ockenden*, 1 Atk. 234; and that these cases were followed by a string of decisions, beginning with *French* v. *Fenn*, C. B. L., 7th Ed. 536, A. D. 1783, and extending over a period of more than thirty years, during which *French* v. *Fenn* was the leading case upon this subject. At last, in 1818, *Rose* v. *Hart* was decided, and the rule established which now prevails, namely, "that *mutual credits*, within the meaning of the bankrupt laws, are *credits which must, in their nature, terminate in debts*." And this it is submitted means, not, as has been contended in some cases, credits which must, *ex necessitate rei*, terminate in debts, but credits which have a natural tendency to terminate in debts not in claims differing in nature from a debt, such as the right of lien in *Ex parte Deeze*. Thus it was settled, in *Smith* v. *Hodson*, 4 T. R. 211, that an accommodation acceptance is a *credit*, given by the acceptor to the party accommodated; and yet it is not *certain* to end in a debt, for the party accommodated ought to provide for the bill at maturity, and if he do, there will be no debt.

The cases between *French* v. *Fenn*, and *Rose* v. *Hart*, are all recognised by the latter case, and stated by the Lord *Chief Justice* to be reconcilable with, and supported by, his decision. They are therefore still of authority, and it will be necessary to review them before proceeding to the cases subsequent to *Rose* v. *Hart*. The case of *French* v. *Fenn*, itself, is well abridged by the Lord *Chief Justice* in the text, and is well epitomized by the same learned Judge, while at the bar, in his argument in *Smith* v. *Hodson*, *ante*, so that it is unnecessary to repeat the facts here at full length. It is a very remarkable case, and was long the leading decision on this subject; and, excepting the overruled case of *Ex parte Deeze*, and the recent decision of *Easum* v. *Cato*, goes perhaps further than any case upon this branch of the bankrupt laws. *Smith* v. *Hodson*, 4 T. R. 211, is reported at length in this number, being the leading case upon another equally important point. As far as it bears on the present subject, it was expressly approved of by the court in *Hulme* v. *Mugglestone*, 3 Mee & Welsb. 30. In *Atkinson* v. *Elliott*, 7 T. R. 378, the defendant sold the bankrupt a parcel of tars for 430*l.* at six months' credit, for which the bankrupt accepted a bill, and afterwards bought another parcel for 230*l.* on the same terms. On the first bill becoming due, he gave the defendant two bills on third parties, making together 600*l.*, and the defendant undertook, on their being paid, to return 170*l.*, it not being intended to do more than take up the bill accepted for the price of the first parcel. In an action for the 170*l.*, the defendant was allowed to set off his demand for the second parcel of goods. In *Ex parte Boyle re Shepherd*, 15 Aug., 1803, Co. Bank. L., 8th Ed., 571, Lord Cork, to accommodate Shepherd, who was his solicitor, drew four notes, two payable to Nibbs or order, and two to Shepherd or order, making, in the whole, 981*l.* 0*s.* 3*d.* Lord Cork having been forced to take up one of them before the bankruptcy, and two afterwards, the question was, whether these payments could be set off against a debt due from his lordship to Shepherd's estate. The *Lord Chancellor* at first thought that the account must be taken as it stood at the time of the bankruptcy, and that the debt could not be set off against the mere liability on which no payment was made till after the bankruptcy; but afterwards his lordship said he had considered the case, and was of opinion, that the petitioner was entitled to set off the debt against the payments *after* the bankruptcy. That an accommodation acceptance, not paid till after the bankruptcy by the acceptor, could be set off against the estate of the party accommodated, was also decided in *Ex parte Wagstaff*, 13 Ves. 65; and these cases were cited with approbation by *Parke*, B., in *Hulme* v. *Mugglestone*, 3 Mee & Welsb. 30. In *Sheldon* v. *Rothschild*, 8 Taunt, 156; 2 Moore, 43; Otte drew a bill on B. & Co., for 400*l.*, which they

accepted without value. They afterwards owed Otte 236*l.* 11*s.* 3*d.*, and drew on him for 163*l.* 8*s.* 9*d.*, the balance. This bill they sold to the defendant, and afterwards became bankrupts, the 400*l.* bill remaining in Otte's hands unpaid. Otte accepted without notice of the bankruptcy, and paid the 163*l.* 8*s.* 9*d.* to the defendant, on which, the assignees of B. & Co. brought an action, as for money had and received; but the court held that there was a mutual credit between the bankrupt and Otte, and that, inasmuch as he could have set off his demand on the estate in any action brought against him, the defendant, whom he had indemnified, and who stood in his place, might do so also.

The next decision is the principal one of *Rose* v. *Hart*, which is reported in the same volume with *Sheldon* v. *Rothschild*, the Lord C.J. *Gibbs*, who had argued, when at the bar, in *Smith* v. *Hodson*, delivering the judgment, which was one of the last pronounced by that distinguished judge. This case settled the law upon the subject; the subsequent decisions turning all of them on the applicability of the rule, promulgated in *Rose* v. *Hart*, to particular states of fact. In *Collins* v. *Jones*, 10 B. & C. 777, it was laid down by *Bayley*, J., that, "*whoever takes a bill, must be considered as giving credit to the acceptor; and whoever takes a note, credit to the drawer.*" See also *Arbouin* v. *Tritton*, Holt, 608; *Edmeads* v. *Newman*, 1 B. & C. 418. In *Belcher* v. *Lloyd*, 10 Bingh. 316, a distinction was engrafted on the above rule; namely, that the holder of the bill or note, to be within the statute, must not be a mere agent holding it for the benefit of a third person. In that case, Maberly's assignees sued Lloyd and Co., acceptors of a bill for 1,000*l.*, drawn by the Commercial Banking Co., and indorsed to Maberly. When Maberly became bankrupt, Lloyd and Co. had in their hands a bill for 760*l.*, drawn by a firm in which Maberly was a partner, accepted by a firm in which he was also a partner, and indorsed by the Commercial Banking Co. This bill became due on the 6th of January, the day on which Maberly stopped payment, whereupon Lloyd and Co. protested it; and having in their hands sufficient assets of the Commercial Banking Co. to discharge it, debited the company with the amount, and sent them the protested bill, with a receipt for it. The Commercial Banking Co. sent back the bill, requesting Lloyd and Co. to set off its amount against their own acceptance for 1,000*l.*; and the question was, whether they had a right to do so. The court held not. "Can it be said," asked Mr. J. *Bosanquet*, "that the defendants are creditors of Maberly, and hold the bill on their own account? If not, and if they hold the bill as mere trustees for the Scotch house, as such trustees they are not entitled to set it off against a demand made on themselves in their own right." That the demands in respect of which a set-off is claimed must be in the same right, is established by several cases. See *West* v. *Pryce*, 2 Bingh. 555; *Ex parte Whitehead*, 1 G. & J. 39; *Staniforth* v. *Fellowes*, 1 Marsh, 184. Thus in *Groom* v. *Medley*, 3 Bingh. N. C. 138, where, to an action for money had and received to the use of the assignees, the defendant pleaded a set-off of money due to him from the bankrupt, it was held ill on demurrer.

A very remarkable case on this part of the bankrupt law is *Easum* v. *Cato*, 5 B. & A. 861, in which the doctrine of mutual credit has, perhaps, been carried further than in any case subsequent to *Rose* v. *Hart*. In *Easum* v. *Cato*, J. S., being desirous of making a shipment at his own risk, but not in his own name, represented to the merchants through whom the shipment was to be made, that the goods were A.'s; and procured A. to write to them to insure, and make advances on the goods, which was done. J. S. having become a bankrupt, it was held, that A. might recover the proceeds of the goods, and set off a debt due to himself from J. S. in an action for them by the assignees. The nature and extent of the rule laid down in *Rose* v. *Hart* are well illustrated by the two cases of *Rose* v. *Sims*, 1 B. & Ad. 521, and *Gibson* v. *Bell*, 1 Bingh. N. C. 748; in the former of which it was held, that an agreement *to indorse* a bill of exchange did not create such a credit as the statute intends; in the latter, that an agreement *to accept* a bill did create such a credit. These

cases turned on the distinction between an *acceptance* which creates a debt, and an *indorsement* which creates only a suretyship. In *Hulme* v. *Muggleston*, 3 Mee & Welsb. 30, to an action for money had and received to the use of the assignees of John Smith, the defendant pleaded, that *before notice of the bankruptcy*, he indorsed a bill for Smith's accommodation, and discounted another for him, both of which he was obliged to take up *after* the bankruptcy; that *before* the bankruptcy, Smith lent him a cheque, the proceeds of which he received *after* the bankruptcy, which was the same money now sued for, and against which he claimed to set off the amount of the dishonoured bills. The court held the plea good. It must be borne in mind, that any demand proveable under the fiat may, by the express words of the statute, be set off. The history of this head of the bankrupt laws is so clearly, and, at the same time briefly, sketched by the Lord Chief Justice *Tindal*, in his judgment in the case of *Gibson* v. *Bell*, 1 Bingh. N. C. 753, that this note cannot be better concluded than by extracting it.

"The principle," said his lordship, "which the bankrupt laws seem to have had in view, from the earliest time to the last provisions made therein, is this, that where two persons have dealt with each other on mutual credit, and one of them becomes bankrupt, the account shall be settled between them, and the balance only payable on either side. That this was the practice of the commissioners of bankrupt, long before any statutory provision on the subject, appears clear from the two earliest decided cases—*Anonymous*, 1 Mod. 215, before Lord Chief Justice *North*, and *Chapman* v. *Derby*, 2 Vern. 117. The first statute which made any express provision on the subject, was the expired statute, 4 & 5 Anne, c. 17. By that statute it was enacted, in the eleventh section, 'that where there hath been mutual credit given between the bankrupt and any debtor, and the accounts are open and unbalanced, it shall be lawful for the commissioners, or assignees, to adjust the account; and the debtor shall not be compelled to pay more than shall appear to be due on such balance.' This provision of the expired statute of Anne is re-enacted in the twenty-eighth section of 5 G. 2, c. 30, with some variation in the expression; that section enacting, that 'the commissioners, or assignees, shall state the account between them, and one debt may be set against another; and what shall happen to be due on either side, on the balance of such accounts, and on setting such debts against one another, and no more, shall be claimed, or paid, on either side respectively.' This statute continued in force until the 46 G. 3, c. 135, s. 3, which provides, that where there hath been mutual credit given, or mutual debts between the bankrupt and any other person, 'one debt or demand may be set against the other, notwithstanding any secret act of bankruptcy before committed.' The same language is continued in the last statute, 6 G. 4, c. 16. So that from the earliest practice to the latest provision by statute, the object seems to have been, that the account should be stated, as between merchant and merchant; and that whatever would be in ordinary practice a pecuniary item in such account, should be the subject of set-off."

HIGHAM *v.* RIDGWAY.

TRIN.—48 *GEO.* 3, *K. B.*

[REPORTED 10 EAST, 109.]

If a person have peculiar means of knowing a fact, and make a declaration or written entry of that fact, which is against his interest at the time, it is evidence of the fact as between third persons after his death. And therefore an entry made by a man-midwife who had delivered a woman of a child of his having done so on a certain day, referring to his ledger, in which he had made a charge for his attendance, which was marked as paid, *is evidence upon an issue as to the age of such child at the time of his afterwards suffering a recovery.*

UPON error brought to reverse a recovery suffered by Wm. Fowden, the younger, of certain lands in the county palatine of Chester, of which he claimed to be first tenant in tail under indentures of the 16th and 17th of December, 1763, it appeared that the premises were limited in remainder to the first son of the body of Wm. Fowden, the father, in tail, with remainder to the second and other sons in tail, remainder to the daughters in tail: under which last limitation the plaintiff Elizabeth claimed, in default of heirs male of Wm. Fowden the father, as heir of the body of Mary, his only daughter. The record set forth the recovery, which was of the session at Chester, on the 16th of April, 29 G. 3, and appeared to have been acknowledged at Macclesfield on the 15th of April, 1789, and that an affidavit was sworn on that day by Wm. Morley, Wm. Fowden, sen., and Mary the wife of John Orme, in which Wm. Fowden, sen., swore "that Wm. Fowden the younger was born on the *second* of April, 1768, but that, being a Protestant Dissenter, no entry was made of his baptism in any register." And Mary Orme swore that she was aunt to

Wm. Fowden, jun., and well remembered that he was born in the beginning of April, and before the 15th day of that month, in the year 1768." And the error assigned was, that it appeared in the record, &c. that Wm. Fowden, jun., on Friday, in the aforesaid session at Chester, appeared by attorney and warranted the tenements, &c. to E. (the tenant), &c.; but that Wm. Fowden, jun., was then an infant within the age of twenty-one years, *viz.*, twenty years and no more. And on joinder in error, the issue was, " Whether Wm. Fowden the younger, at the time of his appearance and warranty, and voucher to warranty, and also at the time of the giving of the said judgment (of recovery) was an infant within the age of twenty-one years, to wit, of the age of twenty years and no more."

At the trial at Chester, it appeared that Wm. Fowden, jun., died on the 31st of December, 1792, having before made his will, and Wm. Fowden, sen., the father, died on the 20th of March, 1806; but Mary Orme, the aunt, was still living, and examined as a witness by the defendant in support of the fact as sworn to in her affidavit; but the accuracy of her recollection as to the precise day of her nephew's birth was rendered doubtful by circumstances which came out upon cross-examination. And on the part of the plaintiffs, it was, amongst other things, proved by a neighbour that Wm. Fowden the father, and his wife, lived at Bramhall, where William the son was born; that it was on a Friday. That he was desired by the father to fetch Mr. Hewitt, the man-midwife, who lived at Stockport, about three miles and a half distant: the witness, however, had occasion to go elsewhere, and another person was sent to Mr. Hewitt, and on the witness's return the same evening, Mrs. Fowden was brought to bed of a son. That the wife of Richard Fallows, who lived half a mile off, was also delivered on the same day. The person who was sent to Mr. Hewitt's corroborated this account, and knew young Fallows and young Fowden as they grew up, who appeared about the same age. Another witness also proved the birth of young Fowden on a Friday (the particular day of the week was proved by reference to market day and other collateral circumstances by the several witnesses), and that he saw Mr. Hewitt at Fowden's house. Fallows, the son, also proved his growing up with Wm. Fowden, the son;

that they used to dispute which was the eldest; but they were both born on the same day; and he had been told this by Fowden's father and mother. His own birth-day was on the 22d of April. Other witnesses also deposed to the same effect. John Hewitt was then called, the son of the man-midwife who delivered Mrs. Fowden; and he proved the death of his father twenty years before, and produced certain books (on which the question of evidence arose) in which his father had been used to make regular entries of all matters relating to his business, with their dates, immediately on his return home; and the entries in question were proved to be in his father's handwriting. These entries were tendered in evidence to show the precise day of the birth of Wm. Fowden, jun. The evidence was objected to; but the court determined to receive it, reserving the point. The entries in question (which were preceded and followed in order of time by others of the like nature) were as follow.

√

"22 April, 1768.

38 (*a*). Richard Fallows's wife. Bramhall. *Filius circa hor.* 9, *matutin: cum forcipe, &c.* paid."

(*a*) The figures 38 referred to the ledger.

Then followed in the same page the entry in question, without any intervening date.

"√. Wm. Fowden, junr's., (*b*) wife 79 (*c*). *filius circa hor.* 3 *post merid. nat. &c.*"

(*b*) This was the designation at that time of the father of William Fowden, jun., in question.

"Wm. Fowden, junr., 1768.

Aprilis 22. *Filius natus, &c.*			
Wife	1	6	1
26th. *Haustus purg.*	0	15	0
	2	1	1

Pd. 25th Oct. 1768."

(*c*) These figures referred to the ledger, the entry in which follows.

The jury found, on this evidence, that Wm. Fowden, jun., who suffered the recovery, was not born on the 2d, but on the 22d of April, 1768.

Topping and *Yates* showed cause against a rule for a new trial, and contended that the entries in question, proved to be in the handwriting of the man-midwife, and to have been regularly made from time to time in the course of his business, were evidence of the time of the birth of Wm. Fowden, the son, as having been made by a person possessing a competent knowledge of the fact, and discharging the party on whom he had a claim in the first instance for his medical attendance. Similar evidence has been admitted in other cases. In *Warren d. Webb* v. *Greenville* (*a*) the question was, Whether there had been a surrender of part of the estate, which was in jointure to the widow at the time of the recovery suffered by the son, tenant in tail; without which there was no good tenant to the præcipe for that part, and the recovery was ineffectual for so much. It was insisted that a surrender should be presumed at that distance of time (*b*); and to fortify that presumption, the debt-book of the family attorney, who was dead, was produced, wherein he charged so much for suffering the recovery, including several items for drawing and engrossing the mother's surrender: all which charges appeared by the book to have been paid. And this was held to be good evidence, after the death of the attorney, who, if living, might have been examined to the fact. This report of the case is in the main confirmed, as to this point, by Lord *Mansfield*, in *Goodtitle d. Brydges* v. *The Duke of Chandos* (*c*); with this addition, that a receipt had been given upon the bill, which contained the articles, for drawing and engrossing the surrender. Though Lord *Mansfield* seems to have thought that Sir *John Strange* had not laid sufficient stress in his report upon the presumption arising from the length of time. So rentals, or steward's accounts, with *payments* marked on them, are always received in evidence (*d*), even against third persons. In *Herbert* v. *Tuckal* (*e*), upon a question, whether one was of full age when he made his will, an entry made by his father in an almanack of the day of his son's birth, was allowed by the court, on a trial at bar, to be strong evidence: and yet that was no question of pedigree, and therefore not within the exception which allows the hearsay declarations of the family to be evidence in such cases, any more than the declaration of a father as

(*a*) 2 Stra. 1129.

(*b*) The trial was in 1740.

(*c*) 2 Burr. 1071,2.

(*d*) 12 Vin. Abr. 90, tit. *Evidence*, pl. 13 and 14. *Barry* v. *Bebbington*, 4 Term Rep. 514; and *Stead* v. *Heaton*, *ib.* 669.

(*e*) T. Ray, 84.

to the *place* of his son's birth, which was rejected as evidence in *The King* v. *The Inhabitants of Erith* (*a*). (*a*) 8 East, 539.

Manley, Serjt., and *John Williams*, contrà.—The question, whether these entries be evidence, cannot depend on their apparent accuracy, but on this: whether the declarations of a third person, by parol or in writing, as to a fact, which may be supposed to have been within his knowledge at the time, can, after his death, be given in evidence, merely because, in the same breath or writing, he admitted that a claim of his own respecting such fact, if true, had been discharged. Ever since the case of *The King* v. *Eriswell* (*b*), it has been considered that *hearsay* is not evidence of a particular fact, except in proof of a pedigree; and that exception has always been confined to the strict fact in issue of descent or primogeniture in proof of pedigree; and has always been rejected in collateral inquiries; as of the place of birth, upon a question of settlement, in *The King* v. *Erith*. And perhaps the case of *Herbert* v. *Tuckal*, which might have been a question between the heir at law and devisee, may have passed as a question of pedigree, without adverting to this distinction. Now here the precise fact in issue was, "Whether Wm. Fowden, the younger, at the time of his appearance and warranty, &c., was an infant within the age of twenty-one years?" &c., in which no question of pedigree is involved. But not even in questions of pedigree have the declarations of any others than members of the family been received in evidence; and the evidence given here was of the declaration of a stranger; for such the apothecary must be taken to be. The admissibility, therefore, of the evidence stands wholly upon the ground that the entry made by him, taken altogether, discharged his own claim. All the cases on this head rest upon the original authority of *Warren d. Webb* v. *Greenville* (*c*), which by the explanation afterwards given of it by Lord *Mansfield* (*d*), turned mainly upon the presumption of the surrender arising from lapse of time; and his very solicitude to explain this shows that he was not so well satisfied of the admissibility of the entries in the attorney's bill-book, which he says was strongly litigated; and he concludes his observations by saying that Sir J. Strange's report is incorrect. Both in *Barry* v. *Bebbington* (*e*), and in *Stead* v. *Heaton* (*f*), the persons whose entries were

(*b*) 3 Term Rep. 707, (and see *Rex* v. *Ferry-frystone*, 2 East, 54, where the question was finally set at rest.)

(*c*) 2 Stra. 1129.

(*d*) In *Goodtitle* v. *Duke of Chandos*, 2 Burr. 1072.

(*e*) 4 Term Rep. 514.

(*f*) *Ib.* 660.

given in evidence had in the first instance charged themselves with the receipt of money, for which they were accountable to others, to whom their accounts were delivered; but where the entries of the receipt of rent had been made by the owner of the estate himself, as in *Outram* v. *Morewood* (*a*), they were held not be evidence even to prove the identity of the land in a cause between other persons. And on the same principle Lord *Kenyon*, in the case of *Calvert* v. *The Archbishop of Canterbury* (*b*), ruled that an entry of an agreement for a pair of horses, made in the plaintiff's books by his servant, who was dead, was not evidence to charge the defendant for the hire of them, because the servant did not thereby charge himself. So this, being an entry made merely for the party's own use, must be considered as *res inter alios acta*. The case of *Roe d. Brune* v. *Rawlings* (*c*) went on a different ground; for there the letter written by a former steward of the estate to the then tenant for life, containing a particular of the ancient rents, &c. was by him handed down amongst the muniments of the estate to the succeeding tenant for life, and preserved by each *against his own interest*, as an authentic document; and on this ground it was held to be evidence of the ancient rent against the lessee of the last tenant for life, by whose acknowledgment of the fact such lessee was bound. They also noticed that the apothecary's discharge of his demand was not made upon the entry as to the time of the child's birth, but only in the ledger to which the entry referred. And they observed upon the dangerous consequence of introducing a laxity in the rules of evidence by extending the exceptions of hearsay evidence of particular facts beyond the strict question of pedigree, and that class of cases where entries had been made by stewards and such like, to charge themselves in account with the payment over of sums they had received in right of others, to whom those accounts were delivered.

(*a*) 5 Term Rep. 121.

(*b*) 2 Esp. N.P. Cas. 646.

(*c*) 7 East, 279.

Lord *Ellenborough*, C. J.—I should be extremely sorry if any thing fell from the court upon this occasion, which would in any degree break in upon those sound rules of evidence which have been established for the security of life, liberty, and property; but in declaring our opinion upon the admissibility of the evidence in question, we shall lay down no rule which can induce such ruinous conse-

quences, nor go beyond the limits of those cases which have been often recognized, beginning with that of *Warren* v. *Greenville*. The question is, whether the books of a man-midwife, attending upon a woman at the time of her delivery, and making charges for such his attendance, which he thereby acknowledges to have been paid, are evidence of the time of the birth of the son, as noted in those entries? That the books would be evidence in themselves, as recording this event of the birth, and other similar events, in the course of his attendance on his patients, at the several times when they took place, I am by no means prepared to say. Nor is my opinion in this case formed with reference to the declarations of parents, &c. received in evidence, as to the birth or time of the birth of their children. But I think the evidence here was properly admitted, upon the broad principle on which receivers' books have been admitted; namely, that the entry made was in prejudice of the party making it. In the case of the receiver, he charges himself to account for so much to his employer. In this case, the party repelled by his entry a claim which he would otherwise have had upon the other for work performed, and medicines furnished to the wife; and the period of her delivery is the time for which the former charge is made, the date of which is the 22d of April; when, it appears by other evidence, that the man-midwife was in fact attending at the house of Wm. Fowden. If this entry had been produced when the party was making a claim for his attendance, it would have been evidence against him, that his claim was satisfied. It is idle to say that the word *paid* only shall be admitted in evidence, without the context, which explains to what it refers: we must therefore look to the rest of the entry, to see what the demand was, which he thereby admitted to be discharged. By the reference to the ledger, the entry there is virtually incorporated with and made a part of the other entry of which it is explanatory. So far, therefore, the case of *Warren* v. *Greenville*, if it be law, is an authority in point to the present case. But it is supposed that, after the evidence of the solicitor's book there had been received, the court had repented of their decision, and put the case to the jury entirely on the presumption of a surrender from length of time. But how does that appear, either upon the report in *Strange*, or by what

fell from Lord *Mansfield*, in the case in *Burrow?* *Warren* v. *Greenville* was decided in the year 1740, about forty years after the time when it was insisted that the surrender should be presumed to have been made. And to fortify that presumption, the report says that the defendant offered the attorney's debt-book in evidence, containing charges for drawing and engrossing the surrender, which it appeared by the book were paid. This evidence was objected to, but allowed by the court, who thought it material, upon the inquiry into the reasonableness of presuming a surrender, and not to be suspected to be done for this purpose. The entries were read accordingly. But the court afterwards declared, "that without that circumstance, they would have presumed a surrender; and desired it might be noticed that they did not require any evidence to fortify the presumption after such a length of time." Now what is the fair inference to be collected from that report? Not that the court doubted at all whether the evidence of the entries in the book had been properly received; but that they were afraid that by fortifying and buttressing up, by this further evidence, a presumption so strong, from the mere lapse of time they might be supposed to have weakened that presumption; which they wished to guard against. And this is in substance the account which Lord *Mansfield* himself gives of that decision in the case in *Burrow*. But he also states that the point of evidence was strongly litigated; which shows that it did not pass without much discussion and consideration: and his account of the fact there given in evidence, so far from showing the report to be incorrect, is a strong confirmation of it in the material circumstance. Here it appears distinctly from other evidence that there was the work done for which the charge was made; for the man-midwife was sent for by the father, and he attended at the house on the day when the mother was delivered; and the discharge in the book, in his own handwriting, repels the claim which he would otherwise have had against the father from the rest of the evidence as it now appears. Therefore the entry made by the party was to his own immediate prejudice, when he had not only no interest to make it, if it were not true, but he had an interest the other way, not to discharge a claim which it appears from other evidence that he had. The evidence, therefore, in this

case was properly received, as well upon the authority of the case of *Warren* v. *Greenville* as upon principle.

Grose, J.—General rules of evidence are of the greatest consequence; for either admitting evidence of a fact when it should be excluded, or rejecting it when it ought to be admitted, would shake the security of all property: the right decision, therefore, of every case of this sort is of great importance. But it is very difficult sometimes to distinguish the nice shades of difference between cases of this description; and therefore I am always glad to find an express authority on which I can set my foot. The case of *Warren d. Webb* v. *Greenville* is of that sort, which ought not now to be called in doubt, having been confirmed in the subsequent case by Lord *Mansfield*, and since that again by this court. Relying, therefore, upon the authority, which applies most strongly to this case, I think the evidence was rightly admitted. And even without the entries, I think there was evidence sufficient to find the verdict which has been given, though those entries put the matter out of all question.

Le Blanc, J.—On inquiring into the truth of facts which happened a long time ago, the courts have varied from the strict rules of evidence applicable to facts of the same description happening in modern times, because of the difficulty or impossibility, by lapse of time, of proving those facts in the ordinary way by living witnesses. On this ground, hearsay and reputation (which latter is no other than the hearsay of those who may be supposed to have been acquainted with the fact, handed down from one to another), have been admitted as evidence in particular cases. On that principle stands the evidence in cases of pedigree, of declarations of the family who are dead, or of monumental inscriptions, or of entries made by them in family bibles. The like evidence has been admitted in other cases, where the court were satisfied that the person whose written entry or hearsay was offered in evidence had no interest in falsifying the fact, but, on the contrary, had an interest against his declaration or written entry; as in the case of receivers' books. I do not mean to give any opinion as to the mere declarations or written entries of a midwife who is dead, respecting the time of a person's birth, being made of a matter peculiarly within the knowledge

of such a person: it is not necessary now to determine that question; but I would not be bound at present to say that they are not evidence. But here the entries were made by a person who, so far from having any interest to make them, had an interest the other way: and such entries against the interest of the party making them, are clearly evidence of the fact stated, on the authority of the case of *Warren* v. *Greenville*, and of all those cases where the books of receivers have been admitted. I understand the expressions used by Sir John Strange, in his report of that case, very differently from what they have been argued to mean. There was a presumption there of a surrender from the circumstances of the case, and from length of time; and besides that presumption so arising, there was a confirmation of it by the entry in question. The court only said that there was sufficient to presume the surrender, without the evidence of the entry; but not that they had any doubt that the entry was evidence. And this account of it is, I think, confirmed by Lord *Mansfield*, in the case in *Burrow;* who says that the point was much debated, and explains the observation made by Sir John Strange at the conclusion of his report. Then I cannot distinguish this from the case of *Warren* v. *Greenville*, nor from those of receivers' accounts, nor from *Roe d. Brune* v. *Rawlins*. The reasons given for admitting the evidence in the latter case, apply also to the present, though I think in a much stronger degree. And I cannot agree to distinguish the entry from the ledger in favour of the objection; for in the ledger, in which Hewitt discharges his claim, the date is mentioned: but at any rate that is not weakened by its correspondence with the other entry.

Bayley, J.—This was no officious entry made by one who had no concern in the transaction: he had no interest in making it: and as he thereby discharged an individual against whom he would otherwise have had a claim, I think the entry was evidence by all the authorities. There were two entries read, the one following the other, without any intervening date; the first of these, relating to Fallows, is dated the 22d of April, 1768; and this is marked as *paid:* the next, as to Fowden, is not stated there to be paid; but it refers to a particular page in the ledger, where the charge against Fowden is made, including items, one of which is for delivering his wife, corresponding in date with the former

entry; and there he states himself to have been paid for his work and medicines. Therefore, if he had brought an action for his work, and had received notice to produce his books, this entry would have discharged the father. Now all the cases agree, that a written entry, by which a man discharges another of a claim which he had against him, or charges himself with a debt to another, is evidence of the fact which he so admits against himself, there being no interest of his own to advance by such entry. In *Outram* v. *Morewood* the entry made was for the party's own interest who made it; for he entered the receipt of rent from another person; therefore, if that had been evidence for him, or for those claiming under him, it would have been furnishing evidence for himself of a right to the estate. But the principle to be drawn from all the cases, beginning with *Warren* v. *Greenville* down to *Roe* v. *Rawlings*, is, that if a person have peculiar means of knowing a fact, and make a declaration of that fact, which is against his interest, it is clearly evidence after his death, if he could have been examined to it in his lifetime. And that principle has been constantly acted upon in the case of receivers' accounts.

Rule discharged.

In *Price* v. *Lord Torrington*, *ante*, vol. i. 139, and the cases which are collected in the note to it, the entries, it will be remembered, were received upon the ground, that they were entries made by a person having knowledge of the fact, entered contemporaneously therewith, and *in a course of business*. *Higham* v. *Ridgway* belongs to a different class of cases, those, namely, in which the entry has been received, because *against the interest* of the party making it. That this is a good reason for admitting an entry made by a person deceased to be evidence, numerous decisions have established beyond all controversy; and that this was the ground on which *Higham* v. *Ridgway* was decided, is clear, from the expressions of *Le Blanc*, J., who expressly guards himself from the supposition that he was delivering any opinion on the question whether the entries would have been receivable merely on the ground that they were made by a person having peculiar means of knowledge.

Another observation which may be made on the facts of *Higham* v. *Ridgway* is, that though the entry certainly bore testimony to the creation of the very charge of which it showed the subsequent liquidation, and was, therefore, not only an entry *against* Hewitt's interest, so far as it shewed *payment*, but also an entry *for* his interest, so far as it showed work and labour done, for which he was entitled to be paid; still we must not infer, that an entry, being itself the only evidence of the creation of the charge of which it shows the payment, would be *admissible* in evidence. Indeed *Doe d. Gallop* v. *Vowles*, 1 Moo. & Rob. 261, appears to be an express authority that such an entry would not be admissible. In *Higham* v. *Ridgway*, there was, as will

be seen, abundance of proof, *by witnesses*, that Hewitt was really called in, and really delivered Mrs. Fowden, so that the *parol* evidence showed clearly, that a debt was due to him, and the only new facts introduced by the entry were the date and the discharge of it. *Doe* v. *Vowles*, was an ejectment prior to 3 & 4 W. 4, c. 27, the lessor of the plaintiff was the representative of a mortgagee, and the question was, whether the possession of the defendant had been adverse to his title for the last twenty years. To prove that it had not been so, the lessor of the plaintiff proposed to show that the mortgagee had repaired the premises while in defendant's occupation, and for this purpose he produced *a bill for the repairs, with a receipt for the amount of it*, in the handwriting of a deceased carpenter, and which had been found among the mortgagee's papers. It was objected to the reception of this in evidence, that it was not an entry against the interest of the carpenter; since, though it showed that his demand had been paid, it was also the only evidence that such a demand ever had existed. The counsel for the plaintiff cited *Higham* v. *Ridgway*; but *Littledale*, J., rejected the evidence, saying, "The cases have gone quite far enough; there would be no limit if such a paper as this were admitted." Lord *Ellenborough*, in the principal case, seems to have pointed at this distinction, when he remarked, "Here it appears distinctly *from other evidence*, that there was the work done for which the charge was made; for the man-midwife was sent for by the father, and he attended at the house on the day when the mother was delivered; and the discharge in the book, in his own handwriting, repels the claim which he would otherwise have had against the father *from the rest of the evidence* as it now appears." And certainly, the distinction is not an unreasonable one, for when it has been proved, by other unsuspicious evidence, that that part of the entry which makes in favour of the writer, is no more than a true and honest statement, no mind can hesitate in coming to the conclusion, that that part which is at variance with his interest is equally so, though, while the part which militates in the writer's own favour stood unconfirmed, suspicions might have been conceived, that the whole statement was a fiction.

The qualification appended in the text by *Bayley*, J., to the general rule as to the admissibility of entries against interest, contained in the words "if he (*i. e.* the party making the entry) could have been examined in his life-time," was disapproved of in *Short* v. *Lee*, 2 Jac. & Walk. 489; and in *Gleadow* v. *Atkin*, 1 Cr. & Mee, 424, where the same learned judge, then a baron in the Exchequer, stated, that he had great doubts if he ever used the qualification: "My reason," said the learned baron, "for doubting, whether I used the expression, is this, that having at that time abstracted *Roe* v. *Rawlings*, and having that abstract before me when I was giving my opinion, I was not likely to have introduced a qualification not warranted by that decision. My entry of the case of *Roe* v. *Rawlings*, in my own note-book, was, that the declaration of a person who has peculiarly the means of knowing a fact, and has no interest in mis-stating it, is admissible, after his death, to prove that fact; and *à fortiori* would it be admissible, if the fact were against his interest? When I afterwards came to abridge *Higham* v. *Ridgway*, I find that I made the following entry—'An entry by a man who is dead will be evidence as to strangers if it relates to a fact peculiarly within his knowledge, if he had no interest in misrepresenting it; or if the entry either charge him with the receipt of money for a third person, or import that a debt, which would otherwise be due to him, is paid.'—There is not a single syllable in that entry as to the qualification, that he could be examined in his life-time.

Although the above extract of *Sir John Bayley* states three points as having been involved in *Higham* v. *Ridgway*:—1. The admissibility of an entry made by a person who had no interest to misrepresent of a fact peculiarly within his knowledge. 2. That of an entry charging the maker with receipt of money from a third person; and, 3, that of an entry importing that a debt, which would be otherwise due to the maker, is paid: it certainly does not appear that the other judges considered that

they were establishing the first of the above three propositions. On the contrary, Lord *Ellenborough* remarks, "That the books would be evidence in themselves, as recording this event of the birth, and other similar events in the course of his attendance on his patients at the several times that they took place, I am by no means prepared to say. But I think the evidence here was properly admitted, on the broad principle on which receivers' books have been admitted, namely, *that the entry made was in prejudice of the party making it*," and *Le Blanc*, J. says, "I do not mean to give any opinion as to the mere declarations or written entries of a midwife, who is dead, respecting the time of a person's birth, being made of matter peculiarly within the knowledge of such a person. It is not necessary now to determine that question. But I would not be bound at present to say that they are not evidence. But here, the entries were made by a person who, so far from having any interest to make them, had a strong interest the other way; and such entries *against the interest of the party making them*, are clearly evidence of the fact stated, &c." The reader, if desirous of inquiring further into the admissibility of entries by a person having peculiar means of knowledge, may consult *Marks* v. *Lahee*, 3 Bing. N.C. 420; and *Price* v. *Lord Torrington*, *ante*, vol. i., p. 139.

Very many cases have occurred since the decision of *Higham* v. *Ridgway*, in which declarations and entries by persons deceased, have been received in evidence as *against interest*. See *Spiers* v. *Morris*, 9 Bingh., 687, where entries by an executor, of his receipts *as executor*, of the rent of lands, in which he had himself a remote interest, were received in evidence. For other instances in which entries made by persons charging themselves with the receipt of money for which they were accountable, have been admitted, see *Witmarsh* v. *George*, 8 B. & C., 556, 3 M. & R., 42; *Dean and Chap. of Ely* v. *Caldecott*, 7 Bingh., 433; *Short* v. *Lee*, 2 Jac. and W., 464; *Stead* v. *Heaton*, 4 T. R., 669, cited in the text of the principal case, *Bullen* v. *Mitchell*, 2 Price 413; *Doe* v. *Cartwright*, R. & M., 62. In *Middleton* v. *Melton*, 10 B. & C., 317, the entry by a deceased collector of taxes, of monies received by him, made in a book which he kept for his own private convenience, was held good evidence against his surety, though the persons from whom he received the money were alive, and might have been called as witnesses. It was contended at the bar, that a collector's entries would only be admissible when made in a public book which it was part of his duty to keep in the course of business; a distinction countenanced by *Goss* v. *Watlington*, 3 B. & B., 132. The rule was, however, established to its utmost extent, "that" (to use the words of *Parke*, J.) "an entry made by a party cognizant of a fact, and having no interest to make a false entry, whereby he charges himself with the receipt of a sum of money, is evidence in fact of the receipt of such money." And it was further held to make no difference that the entry in the private book was intended only as a preliminary to an entry in a public one. In *Gleadow* v. *Atkin*, 1 C. & Mee, 423, Bayley B., adverting to *Middleton* v. *Melton*, says "you are aware of *Middleton* v. *Melton*, I think, that lays this down as a general proposition, that an entry by a man against his own interest, is evidence against all the world."

It was stated in the commencement of this note, that it would appear to follow, from the decision in *Doe* v. *Vowles*, 1 Moo. & Rob., 261, coupled with Lord *Ellenborough*'s observations in the principal case, that an entry is not admissible, as against interest, in which a man acknowledges the discharge of a debt, of the existence of which there is no evidence, save from the entry. The same rule, however, does not necessarily apply to the case of a receiver charging himself with money on one side of an account, and discharging himself upon the other. It is true, indeed, that one part of the entry is *for his benefit*. Still he does not *entitle himself* to anything positive, as in the former case; and if he strike a balance against himself, at the foot of the account, and acknowledge that balance to be unpaid, the result of the whole is clearly to his disadvantage But even if the balance appear to be paid, the case will not be like that of *Doe* v. *Vowles*; since, in an

action brought against the receiver by his employer, the entry would be evidence against him, and the jury might, if they thought proper, or if evidence tending to that conclusion were produced, believe the part in which he charged himself with the receipt of monies, and disbelieve the part which went in his discharge. Whereas in *Doe* v. *Vowles*, it would have been impossible to use that part of the entry which militated to the disadvantage of the tradesman, without first positively admitting that which was for his advantage, inasmuch as the receipt assumes the existence of the debt admitted therein to have been received. The question as to the admissibility of such an account was discussed in *Doe* d. *Teynham* v. *Tyler*, 6 Bingh. 561. But it had previously received an express decision during the trial of the great case of *Rowe* v. *Brenton*: the point for which that case is now cited appears in the report of Messrs. Manning and Ryland, vol. 3, p. 267. It arose as follows: Stephen Pearce, a witness, proved that his father was toller to the Lemon family; his memory did not go back so far as 1765, but he produced a book in his father's handwriting, of that year, containing a debtor and creditor account of receipts of tolls, and said that as far back as his recollection went his father used to keep similar books. Sir James *Scarlett* proposed to put in this toll book, to which *Brougham* objected, arguing that "where a man charges himself with the receipt of money, that is taken to be evidence against him, because it is a declaration in writing against his own interest, and it is not to be presumed that a person would make such a statement unless it were true. But suppose there is, in part of the same document in which the charge appears, a discharge also which squares the account, or perhaps leaves a balance in his favour; then, taking the whole together, charge and discharge, both sides of the account, the reason fails, because it is no longer a declaration by a party *against his own interest*, it may be a declaration *for his own interest*.

Littledale, J. A man is not likely to charge himself for the purpose of getting a discharge.

Lord *Tenterden*, C. J. "Almost all the accounts that are produced are accounts on both sides. That objection would go to the very root of that sort of evidence."

There are a variety of other cases in which the *entries* or other declarations of deceased persons against their own interest have been held evidence as between strangers. See, for example, *Ivat* v. *Finch*, 1 Taunt. 141, where, in an issue between A. & B. whether C. died possessed of certain property, her declaration that she had assigned it to A. was held admissible. In *Peaceable* d. *Uncle* v. *Watson*, 4 Taunt. 16, the declarations of a deceased occupier of land were held admissible to show of whom he held it. "Possession," Lord *Mansfield*, C. J., "is *primâ facie* evidence of seisin in fee simple: the declaration of the possessor, that he is tenant to another, makes most strongly against his own interest." S. P. *Doe* d. *Marjoribanks* v. *Green*, Gow. 227; see *Doe* v. *Jones*, 1 Campb. 367; *Davies* v. *Pearce*, 2 T.R., 53; *Holloway* v. *Rakes*, 2 T.R., 55. So of a declaration by a deceased owner of land, that his land does not extend beyond a particular limit, accompanied by an act of forbearance to transgress such limit, *Stanley* v. *White*, 14 East, 332, 339, 341. In *Wynne* v. *Tyrwhitt*, 4 B & A, 376, entries in the books of the steward of a manor charging himself more than thirty years old and brought from the proper custody, were permitted to be read, without proof of the hand-writing, or of the death. In the late case of the *Baron de Rutzen* v. *Farr*, 4 Adol. & Ell. 53, in order to prove the plaintiff's title to a market, recourse was had to accounts of rent, found among their muniments. Some of these were accounts signed by the person who was steward to the plaintiff's ancestor, wherein he charged himself with the amount of such rents. To these no objection was made. Others were signed, not by such steward but by a person styling himself clerk to such steward. There was no parol evidence to show that this person ever was employed by the steward; but the papers were tendered as speaking for themselves. They were admitted at the trial, but held inadmissible by the court *in banc*, on the ground that they did not purport to charge the person whose signature they bore.

A question has in several cases arisen as to the applicability of the rule discussed in this note to cases in which the representative of the obligee of a bond or holder of a negotiable instrument sued on it after the time of limitation or (in the case of a bond) presumption of payment had elapsed. In such cases, in order to avoid the effect which the lapse of time would otherwise have produced upon the right of action, indorsements of payment of interest by the deceased were sometimes offered in evidence, and it was contended that they were admissible in proof of such payments, being against the interest of the party making them, and that they must be presumed to have been made at the time when they bore date. See *Searle* v. *Lord Barrington*, 2 Str. 826; *Rose* v. *Bryant*, 2 Campb. 322; *Sanders* v. *Meredith*, 3 M. & R. 116; *Smith* v. *Battens*, 1 Moo. & Rob 341, *Gleadow* v. *Atkin*, 1 Cr. & Mee, 410, a case well deserving of perusal, and in which the whole subject of this note underwent an elaborate discussion. See, on the point of the presumption said to arise from the date, *Smith* v. *Battens*, *ubi supra*, *Gleadow* v. *Atkin*, *ubi supra*, in which *Bayley*, B., states he had discovered, by his own researches, that some evidence in addition to the date was given, as to the time of making the entry, in *Searle* v. *Lord Barrington*. See on this the remarks of *Raymond*, C. J., *Turner* v. *Crisp*, 2 Str. 827; and Lord *Hardwicke*, 2 Ves. 43, and generally on the presumption raisable from date, *Wright* v. *Lainson*, 2 Mee. & Welsb. 743; *Hunt* v. *Massey*, 5 B. & Ad., 902; *Goodtitle* v. *Milburne*, 2 Mee & Welsb. 862. By st. 9 G. 4, c. 14, sec. 3, it was enacted that no indorsement or memorandum of any payment, written after the commencement of that statute's operation, on any note, bill, or other writing, by, or in behalf of, the person to whom such payment should be made, should be deemed sufficient proof of such payment, so as to take the case out of the operation of the 21st Jac. 1, c. 16, or the corresponding Irish Act. The time of limitation as to bonds is now fixed by 3 & 4 W. 4, c. 42.

It was attempted in one case at *Nisi Prius*, to extend the admissibility of entries against interest, to the case of a man who had gone abroad under a heavy criminal charge, and was not likely ever to return. His entries however were held inadmissible; *Stephen* v. *Gwennap*, 1 Moo. & Rob. 120.

PATERSON *v.* GANDASEQUI.

HILARY.—52 GEO. 3.

[REPORTED 15 EAST 62.]

If the seller of goods, knowing at the time that the buyer, though dealing with him in his own name, is in truth the agent of another, elect to give the credit to such agent, he cannot afterwards recover the value against the known principal: but if the principal be not known, at the time of the purchase made by the agent, it seems that when discovered, the principal or the agent may be sued, at the election of the seller; unless where, by the usage of trade, the credit is understood to be confined to the agent so dealing: as particularly in the case of principals residing abroad.

THIS was an action for goods sold, and upon the common money counts. At the trial before Lord *Ellenborough*, C. J., at the London sittings after last Trinity term, the following facts appeared. The defendant was a Spanish merchant, and a director of the Philippine trading company at Madrid, with which he was engaged in adventures to a large amount. In January, 1810, being then in London, he employed Messrs. Larrazabal and Co. of London, merchants, to purchase for him various assortments of goods for the foreign market, for which they were to charge a commission of two per cent. Larrazabal and Co. accordingly applied to the plaintiffs, requesting them to send to their counting-house an assortment of silk hose, with their terms and prices. *Paterson*, jun., waited on them at the time and place appointed, with the patterns, terms, and prices; at which time the defendant was present at the counting-house, and the samples were handed over to him. He inspected them, and selected such articles as he required; and the terms and prices were also shown to him and left there. On the

6th of January the plaintiffs received from Larrazabal and Co. an order in writing for 574 dozen of silk hose, to be ready in town on or before the 20th of February next; the payment as agreed upon: (Signed) Larrazabal, Menoyo, and Trotiaga: and shortly after another order for 150 dozen more, with the like signature. Both these orders were given by Larrazabal and Co., for the use of and in execution of the orders received by them from the defendant. The goods were sold by the plaintiffs on the credit of Larrazabal and Co., the invoices were made out in their names and sent to them, and Larrazabal debited the defendant with the amount. Soon after, and before the credit had expired, Larrazabal and Co. became insolvent; and thereupon the plaintiffs demanded payment of the defendant; which being refused, the present action was brought. Lord *Ellenborough*, C. J., being of opinion, upon these facts, that the plaintiffs had dealt with Larrazabal and Co. upon their sole and individual credit, knowing that the purchases they made were on account of the defendant, directed a nonsuit. In the following term it was moved to set aside the nonsuit, on the ground of assimilating this case of a dormant principal to that of a dormant partner, where, though the party furnishing goods to the ostensible partners intended at the time to give credit only to them, yet he may afterwards pursue his remedy against the dormant partner, when discovered. A rule *nisi* having been granted:—

The *Attorney-General*, *Marryat*, and *Littledale*, now shewed cause against it: and observed upon the facts of the case, that the defendant, a foreigner, not wishing to pledge his credit in a British market, employed Larrazabal and Co. to make purchases for him on their own account, to whom he was to be answerable for the purchases so made. The plaintiffs dealt with Larrazabal and Co. as purchasers, and gave them credit for the goods, being aware at the time that they were purchased by Larrazabal and Co. on account of the defendant. If the defendant were to be held liable for the goods to these plaintiffs, he will have to pay twice for them; being clearly liable to Larrazabal and Co. [Lord *Ellenborough*, C. J. I have had instances perpetually before me, where the foreign trader, not choosing to make himself liable, has gone with his agent to the tradesman, and

bought goods in the agent's name. I do not find any case, which decides that where a person sells goods to an agent, with a knowledge of his principal at the time, and gives credit to the agent, he can recover against the principal. [*Garrow*, for the plaintiffs, observed, that the whole of the argument on behalf of the plaintiffs was, that the defendant was not known to the plaintiffs, at the time of the sale, to be the principal.] The facts shew the contrary. The defendant, it appears, was present at the time, and pointed out to the plaintiffs the different articles which he required, and selected them from the patterns. The only ground, therefore, for holding the defendant liable is that the goods ultimately came to his hands. But if this were enough, every foreign colonist who consigns his produce to his correspondent in this country, and receives in return from the merchant here a cargo purchased in the British market, would be liable to the various dealers of whom the articles composing such cargo were purchased. But it has never been attempted to charge the West India planter in these cases: the reason of which is that, as between him and the dealers, it is understood that the merchant here purchases on his own account. There is no custom to control that particular branch of trade, except what arises out of the understanding of the parties: where the dealings, therefore, are similar, the understanding must be the same. Here the defendant stands precisely in the same situation as the West India planter. He who employs another to purchase for him, may indeed be liable, although the seller gave him no credit; if it shall turn out that he is the actual purchaser; but there is nothing in this transaction or in the nature of Larrazabal's employment, to show that the defendant was the purchaser from the plaintiffs: on the contrary the engagement between them was made with the express view of exempting him from all such liability; and the plaintiffs, by their mode of dealing, have shewn that they so understood it, and cannot therefore now resort to him. [Lord *Ellenborough*, C. J. The case in which I remember that the liability of a principal was carried furthest, was *Powel* v. *Nelson*, upon the Western circuit, of which Mr. Justice *Lawrence* had a MS. note. There, a factor made purchases for his principal, who made payments to him on account. Afterwards, the factor was pressed for payment

by a letter, which came to the hands of the principal, who transmitted it to the factor, and, with a knowledge of the fact, paid him the residue. It was held by Lord *Mansfield*, C. J., that the principal was liable over to the sellers for the money he had so paid to his factor after notice. *The Attorney-General* said he believed that the case went farther, and that the principal there was held liable to the whole amount of the purchases.—*Le Blanc*, J. I should think not: the case can hardly be supported to that extent.] If the seller be at liberty to follow every person into whose hands the goods may have come, it will create endless confusion. A broker may have purchased on account of several principals, and may have received from each of them payments on the general account, or may have made such payments to the seller: in these cases how could the seller apportion such payments, so as to charge each person with his proportional residue? There are many instances where the principal is not liable, as in building contracts; and yet the work done and materials found are for the principal only.—[Lord *Ellenborough* mentioned a late case of *Bramah* v. *Lord Abingdon*, where the defendant had contracted with a surveyor, who ordered goods from the plaintiff for the use of the defendant's house; and yet he was held not liable.] In the present case it appears further, that the plaintiff has made his election to charge Larrazabal and Co. by delivering the invoices to and debiting them with the price; after which they cannot resort to the defendant. There may be a shifting liability from the broker to the principal, when the latter is disclosed; but if once the election be made, that liability ceases; for the plaintiffs cannot have two concurrent debtors.

Garrow, *Park*, and *Richardson*, contrà. There is no circumstance in this case to shew that the plaintiffs knew, at the time of the sale, that the defendant was the principal, except that of his happening to be at the counting-house when the goods were selected. So far from knowing him to be the principal, it does not appear that they knew him even by name. The circumstance of their making out the bills of parcels to Larrazabal and Co., carries the case no further: for that was done at a time when they were ignorant of the defendant's liability; which is an answer also to

the argument derived from the supposed election of the plaintiffs to resort to Larrazabal and Co. only; it being impossible for them to have made any such election until they knew the parties between whom they might elect. It is therefore the common case of a broker who has made purchases for his principal without mentioning his name, in which the principal has always been held liable; as in *Waring* v. *Favenck* (*a*), and *Kymer* v. *Suwercropp* (*b*). In *Railton* v. *Hodgson* (*c*), London sittings after Trinity term, 1804, and *Peele* v. *Hodgson*, at the sittings after Michaelmas term 1804, where the defendant bought goods of the plaintiffs in the name and upon the credit of Smith and Co.; but those purchases were made in reality on his own account; he was held to be liable. *Mansfield*, C. J. said, Suppose a principal authorizes a factor to sell goods, and he sells them in his own name, the principal may call on the vendee for payment. Suppose the defendant had not been known to be the buyer, he would still have been liable: Smith and Co. would only have been nominal buyers. So in *Scrimshire* v. *Alderton* (*d*), even where a factor sold on a *del credere* commission, the vendee was held liable to the owner of the goods after notice given not to pay the factor. This is not like the case put of a foreign principal residing abroad; for the defendant was resident here, and establishing a house of trade. Neither can it be compared with that of a person engaging with a surveyor in a building contract; because there the persons employed under the surveyor have notice by the course of the trade that they are dealing with him only. Here, if the defendant had wished to exempt himself from the ordinary liability, he should have given notice to the sellers that they were to look to Larrazabal and Co. only. No confusion will arise from holding the defendant liable, because the goods here were bought wholly on his account, and not, as in the case supposed, on the account of several principals.

(*a*) 1 Campb. N. P. Cas. 85.
(*b*) *Ibid*, 107.
(*c*) These cases were mentioned on moving for the rule; they will be found post p. 207 *in nota*.
(*d*) 2 Stra. 1182.

Lord *Ellenborough*, C. J.—The court have not the least doubt that if it distinctly appeared that the defendant was the person for whose use and on whose account the goods were bought, and that the plaintiffs knew that fact at the time of the sale, there would not be the least pretence for charging the defendant in this action. But the doubt is,

whether that does sufficiently appear by the evidence. It appears that the defendant was present at the counting-house of Larrazabal, where one of the plaintiffs had come by appointment, and in his presence inspected and selected such of the articles as he required; that the goods were afterwards ordered by Larrazabal and Co., credit given to them, and the invoices made out in their name, and sent to them. The question is, whether all this was done with a knowledge of the defendant being the principal? The law has been settled by a variety of cases, that an unknown principal, when discovered, is liable on the contracts which his agent makes for him; but that must be taken with some qualification, and a party may preclude himself from recovering over against the principal, by knowingly making the agent his debtor. It certainly appeared to me at the trial that the plaintiffs knew of the defendant being the principal, and had elected to take Larrazabal and Co. as their debtors, or I should not have nonsuited the plaintiffs; but as there may perhaps be a doubt upon the evidence, whether the plaintiffs had a perfect knowledge of that fact, it may be as well to have it reconsidered.

Grose, J.—I think that the plaintiffs in this case might have elected whom they would have for their debtor: and here they seem to have made their election. That, however, is the only doubt which is fit to be considered.

Le Blanc, J.—It will be material to have the facts inquired into more fully, in order to ascertain whether the tradesmen sold to the agents with a knowledge of the party for whom they were buying; or whether, without such knowledge, they chose to give credit to the agents, whether buying for another or for themselves. Many of the cases may, perhaps, be found distinguishable from this by their not falling precisely within the doctrine applicable to principal and broker; and it may be necessary to consider, in the present case, whether any distinction can be made between a home and a foreign principal.

Bayley, J.—There may be a particular course of dealing with respect to trade in favour of a foreign principal, that he shall not be liable in cases where a home principal would be liable: that would be a question for the jury. I have generally understood that the seller may look to the prin-

cipal when he discovers him, unless he has abandoned his right to resort to him. I agree that where the seller knows the principal at the time, and yet elects to give credit to the agent, he must be taken to have abandoned such right, and cannot, therefore, afterwards charge the principal. I think it should be reconsidered in this case whether the plaintiffs did so.

Rule absolute.

" *The two cases of* Addison *v.* Gandasequi, *and* Thomson *v.* Davenport, *are so nearly connected with that of* Paterson *v.* Gandasequi, *that it has been thought better to lay them before the reader as a Supplement to it, than to attempt any abridgment of them in the note which follows.*"

ADDISON *v.* GANDASEQUI.

TRINITY.—52 GEO. 3, C. P.

[REPORTED 4 TAUNT. 573.]

A., a merchant, purchases goods of B., for the use of C., who is present, and selects the goods, and stipulates with B., the price and other terms of the purchase. A. credits B. with the amount, and debits C. with the amount and a commission. B. debits A. in his books and invoices. B. cannot recover the price of the goods against C.

THIS was an action for goods sold and delivered, and was tried before *Mansfield*, C. J., and a special jury, at the sittings at Guildhall, after Michaelmas term, 1811, when it appeared that the defendant was a member of a Spanish trading corporation, called the Philippine Company, and was a director of that company, and had come over to England to select a large assortment of goods destined for Lima. Larrazabal, Menojo, and Trotiaga, a house established in London, assisted him in providing the goods, and they having applied to the plaintiff, with whom they had previous dealings for twenty years, the plaintiff went by appointment to the house of Larrazabal and Co., in the city, with patterns of goods: he found the defendant there, who examined various patterns, cheapened the prices, mentioned the market for which they were intended, told the plaintiff he should charge the long price, and he, the defendant, would himself receive the bounty on exportation, and stipulated for fifteen months' credit; he took the goods home to his house in Clarges-street, and kept them a week to examine, and a clerk from the plaintiff's house frequently attended on him there to shew and explain the patterns. The plaintiff received a written order from Larrazabal and Co., for a quantity of these goods; after which, the defend-

ant required of the plaintiff an abatement of 6*l.* per cent. on the prices of them, which the plaintiff refused to make, and the parties were about to terminate the treaty: but at length the defendant agreed to give the whole price required, and told the plaintiff he might proceed to execute the order. The plaintiff and his clerks repeatedly had other meetings with the defendant, and several other parcels of goods were ordered by Larrazabal and Co., which had been selected by the defendant at those meetings. Larrazabal and Co. referred the plaintiff to the defendant for instructions as to the mode in which the goods were to be packed for exportation, and the defendant gave those instructions. The invoices were all made out by the plaintiff to Larrazabal and Co., and they were debited in the plaintiff's books for the amount of the long price. Larrazabal and Co., in their books, debited the defendant with the amount of the invoices, and also with a commission for purchasing them, of 2*l.* per cent. on the amount, which was their ordinary mode of dealing with the defendant, and they credited the plaintiff with the amount of the invoices. Upon an occasion subsequent to these sales, Larrazabal and Co. having applied to purchase some goods of the plaintiff, the plaintiff said he thought he had for that time extended his credit far enough to Larrazabal and Co., and declined furnishing the goods. Larrazabal and Co. gave the orders for packing and shipping the goods, and in their own names; but in pursuance of instructions given by the defendant, chartered a vessel to Lima, in which these goods were conveyed, and instructed the master not to part with the return cargo until payment of the freight and amount of Larrazabal's demand on the defendant. The master did not deliver the return cargo but in consequence of instructions from Larrazabal and Co., after a sum of 72,000*l.* had been deposited by the defendant for their security. One of the partners in their house, which had become bankrupt, being examined, stated, that the house purchased these goods of the plaintiff on their own credit and account, as they would any other goods for which they had occasion in their trade, and Larrazabal and Co. had insured the goods in their own names, for which they had a further commission of a half per cent. The plaintiff contended that though the credit was given to Larrazabal and Co., yet that as the defendant had the goods, he was liable

to pay for them; and that this was only the common case of a broker buying for his principal: the principal, when disclosed, is liable. *Mansfield*, C. J., left it to the jury whether Larrazabal did act as broker or not, and observed that as the defendant saw and handled the patterns, and was seen in the business, if he had been the purchaser, most probably the credit would have been immediately given to him: the jury, under these circumstances, being of opinion that the goods were sold to Larrazabal as principal, found a verdict for the defendant.

Best, Serjt., for the plaintiff, in pursuance of liberty reserved at the trial, obtained, in last Hilary term, a rule *nisi* to enter a verdict for the plaintiff: he cited the cases of *Railton* v. *Hodgson*, and *Peele* v. *Hodgson* (*a*).

Shepherd, Serjt., in Easter term last, shewed cause against the rule, contending, in the first place, that the rule could not be made absolute in the shape in which it was moved; for though the court should think the defendant was not entitled to a verdict, it was not clear the plaintiff was; and the rule, if any, should be for a new trial. He further contended that the effect of the evidence was, that Larrazabal

(*a*) *Railton* v. *Hodgson*, and *Peele* v. *Hodgson*.—These cases are not reported, but, by the brief and notes of the counsel for one of the parties, they appeared to be to the following effect. The former was tried at the sittings after Trinity term, 1804, and the latter at the sittings after Michaelmas term, 1804, before *Mansfield*, C. J. The facts were, that the defendant, Hodgson, had formerly been a clerk with Smith, Lindsay, and Co., and afterwards set up in business for himself, and had a counting-house for himself at the house of Smith, Lindsay, and Co., which the vendors knew; that he purchased goods himself, and directed the vendors to draw bills upon Smith, Lindsay, and Co., and make out invoices to that house, which was then a house of good credit, and without whose security Hodgson could not have obtained credit and made the purchases. Smith, Lindsay, and Co., received from the defendant a commission of from two and half to five per cent. upon the goods. The vendors entered the goods in their own books, in the names of Smith, Lindsay, and Co.; made out the invoices in the names of, and sent them to, Smith, Lindsay, and Co.; and drew bills upon them for the amount, which Smith, Lindsay, and Co. accepted; the defendant insisted that he purchased as the agent of Smith, Lindsay, and Co., and in their names, and on their account, as he used to do when in their employ. There was proof, however, of his being the principal, and having bought the goods on his own account. The plaintiffs obtained a verdict, and *Mansfield*, C. J., in summing up the evidence, observed to the jury, "that it was admitted these goods were never delivered to Smith, Lindsay, and Co.; the defendant had the goods, and the profits and loss: Smith, Lindsay, and Co. were only to have a commission, for which they lent their credit. Suppose a principal authorises a factor to sell goods, and he sells in his own name, the principal may call upon the vendee for payment. It appeared that Hodgson had been a trader from 1798. Suppose Hodgson had not been known to be the buyer, he would have been liable; Smith, Lindsay, and Co. would only have been nominal buyers. If Hodgson had really paid Smith, Lindsay, and Co., it would have depended upon circumstances whether he would be liable to pay for the goods over again; if it would have been unfair to have made him liable, he would not have been so. What pretence was there that the plaintiffs should be thrown upon the insolvent estate of Smith, Lindsay, and Co., who never had the goods? This was a stronger case than that of a dormant partner. The buyer must be liable, though a third person may also unless there is an express agreement that the buyer shall not be liable." The jury found a verdict for the plaintiffs. A motion was made in the following term to set aside the verdict, and have a new trial; but the court refused it.

was not the agent of the defendant in the affairs, but was in fact the principal to whom the credit was given, for that otherwise the defendant could never have obtained the goods; for no one would have given credit to a person unknown, and from whom creditors would have no means of compelling payment but by arrest. And he relied on the fact that the plaintiff, being applied to for some other goods, did not refuse to give the defendant any further credit, but said they would give Larrazabal no further credit.

Best and *Vaughan*, Serjts., in support of the rule, contended, that as there was no fact in dispute in the case, the plaintiff was entitled to have the rule to enter a verdict for him. They insisted that in this case Larrazabal was the mere agent of the defendant, which was indicated by his receiving commission. But the plaintiff in fact had the security of both parties; for under the written order, which did not affect the real buyer, Larrazabal and Co. were liable; and the defendant was liable, because he had the goods, which raised a sufficient contract: for, by the law of England, he who has the goods shall be obliged to pay for them. It had been admitted that when a broker contracts for a principal unknown, when such principal is discovered he may be sued; and so if one partner only contracts, the others, when discovered, are liable. They cited *Railton* v. *Hodgson*, *Peele* v. *Hodgson*, and *Powel* v. *Nelson*, cited by Lord *Ellenborough*, C. J., in *Patterson* v. *Gandasequi*, 15 East, 65; * *Waring* v. *Favenc*, 1 Campb. 85, and *Kymer* v. *Suwercropp*, 1 Campb. 109. The principal could only be discharged by payment, and that payment must be to the vendor, if he is known; if unknown, the vendee must pay the agent; but unless he pays one or the other, he is liable. *Wyatt* v. *Marquis of Hertford*, 3 East, 147.

Ante, p. 200.

Shepherd, in reply on the cases, contended that the authorities of *Wyatt* v. *The Marquis of Hertford*, and *Powel* v. *Nelson*, did not apply: the last was a question of fraudulent payment to the factor by the principal, after knowledge of the factor's not having paid, and notice to pay to the vendor, which Lord *Ellenborough* held to be a payment in his own wrong, for he had no right to pay the factor till he saw the seller paid. The cases of *Railton* v. *Hodgson*, and *Peele* v. *Hodgson*, are more like this, but are an *ex parte*

account of the cause; and as the rule *nisi* was not granted, the subject was not discussed, and therefore the cases were of less authority.

The Court took time to consider, and

Mansfield, C. J., now gave the judgment of the Court. This is a motion made for a new trial, the verdict having been given for the defendant. The circumstances of the case are very singular. The motion is made on the ground that though the actual vendees of the goods were Larrazabal and Co., yet that the verdict ought to have gone against the defendant, as the person for whom the goods were bought by Larrazabal and Co. I left it to the jury to consider whether Larrazabal and Co. were acting as factors for the defendant, or whether the goods were bought by the defendant himself, who was acting for the Philippine Company. In certain cases it would undoubtedly be a monstrous thing to charge the defendant, but in this case there would be no such hardship, because the defendant had received the money of the Philippine Company. The order was given by the house of Larrazabal and Co., and the invoice was made out to them: and the goods were put on board the ship called the Archduke Charles, chartered by Larrazabal and Co., under bills of lading which compelled the captain to deliver the goods to their order; so that throughout the transaction, from the beginning to the end, the goods are treated as purchased by Larrazabal and Co. It was proved that the defendant was at the counting-house of Larrazabal and Co., and was shewn a variety of goods. The defendant objected to the price of the goods, and there was a treaty respecting the terms of payment for them: what had passed between Larrazabal, junior, and the plaintiff, did not appear at the trial: but it was given in evidence, that the former had met the plaintiff, before the plaintiff saw the defendant at the counting-house of Larrazabal and Co. Directions were given by the defendant how the goods were to be packed; so it was very clear from all these transactions that these goods were intended for the defendant, not individually, (although he was a partner in the adventure) but for the use of this company. Moore, the captain of the ship, went to Lima with the goods, and accounted with the defendant for the proceeds of the cargo, but not till after he had written to Larrazabal and Co., and

received orders for him so to do. The orders to the shipper, to the packer, and broker, were read; all of which were made out in the name of Larrazabal and Co. A witness, Trotiaga, from Larrazabal's house, proved that he bought these goods for his own house, exactly as he would buy any other goods; that he had been four years partner; he was in the house of the plaintiff when an order for further goods was proposed, and the plaintiff said that he could not give Larrazabal and Co. any further credit. Larrazabal and Co. gave credit to the plaintiff in their books for the amount of these goods, and debited the defendant. 70,000*l.* had been paid as a deposit, and was now in the Bank, to abide the event of this cause, which I did not understand. I left it to the jury to say *whether this were the common case of a merchant here buying for his correspondent abroad, on which he charged a commission, or whether it was the case of a factor buying goods for his principal;* and they found for the defendant. None of the cases that have been cited at all resemble this case; for although it was not said expressly that the plaintiff did not look to the defendant, yet, upon all the circumstances of the transaction, it evidently appears that he did not. And, if a man selling to another for the use of a third, who stands by and is known, may make contract with the buyer, without making the third person responsible, certainly this is that case. The cases cited of *Railton* v. *Hodgson*, and *Peele* v. *Hodgson*, are very different from this: the partner in the house of Lindsay and Co., gave an account, certainly, of a very strange manner of carrying on the trade, but still he made it the trade of Hodgson: and there could be no doubt in those cases of the liability of the defendant. Now in this case, if it had been intended that the sale should be to the defendant, and that Larrazabal and Co. were to be only sureties, the plaintiff would certainly have debited the defendant, and taken a guarantee from Larrazabal and Co. And only see what a state the defendant would be in, buying, as he does, such an immense amount of goods of the plaintiff and other persons! And although it has been objected by the counsel that it is a hard case, that this money, getting into the hands of Larrazabal and Co., should not find its way wholly to the plaintiff, of whom the goods were purchased, yet we cannot alter the law of the case, or the

nature of the contract, on account of any subsequent events. The insolvency of Larrazabal and Co. may make an unfortunate difference in the case, as to the consequences, but it will not alter their liability. We, who are called on to set aside this verdict, must, in order thereto, say on this evidence, that Larrazabal only was not to be the debtor, but that the defendant also, who was to buy these goods for the Philippine Company, was to be liable; but we can find no evidence to warrant us in that conclusion: the rule therefore must be

Discharged.

THOMSON *v.* DAVENPORT.

HILARY.—9 & 10 *GEO.* 4, *K. B.*

[REPORTED 9 B. AND C. 78.]

At the time of making a contract of sale, the party buying the goods represented that he was buying them on account of persons resident in Scotland, but did not mention their names, and the seller did not inquire who they were, but afterwards debited the party who purchased the goods: Held, that the seller might afterwards sue the principals for the price.

THIS was a writ of error, brought upon a judgment obtained in the borough court of Liverpool against the plaintiff in error. The plaintiff below declared for goods sold and delivered. Plea, general issue. Upon the trial before the mayor and bailiffs, assisted by the recorder, a bill of exceptions was tendered to the direction given by the mayor, bailiffs, &c. by the said recorder to the jury. The bill of exceptions stated, that one Thos. M'Kune was produced and examined upon oath as a witness by the counsel for the plaintiffs, to maintain the issue on their parts. And M'Kune stated in evidence, that he, M'Kune, was established in Liverpool as a general Scotch agent, and, amongst others, acted as agent for the defendant, who resided in Dumfries; that in March, 1823, he received from the defendant a letter, containing an order to purchase various goods, and, amongst others, a quantity of glass and earthenware; which letter, with the order, was produced by the plaintiffs' attorney, and was read in evidence as follows:—"Dumfries, 29th March, 1823. Annexed is a list of goods which you will procure, and ship per Nancy. Memorandum of goods to be shipped: twelve crates of Staffordshire ware, crown window glass, ten square boxes," &c. &c. That he, M'Kune, provided himself with

the goods mentioned in this letter, and that he got the glass and earthenware from the plaintiffs, who were glass and earthenware dealers in Liverpool; that at the time he ordered the glass and earthenware, he saw the plaintiff, Mountford Fynney, himself, and, to the best of his recollection, told him that he, M'Kune, had an order to purchase some goods, and that they were for the same house for whom he had purchased goods from the plaintiffs the preceding year; and he also stated, to the best of his recollection, that "as he was a stranger to the nature of the goods, he hoped that the plaintiffs would let him have the same as before, to save him from blame by his employer;" but he, M'Kune, did not show the *plaintiffs the letter containing the order, nor did he mention the name of any principal;* that he then either gave the plaintiff, Mountford Fynney, a copy of the order, or produced to him the original order, that Fynney might himself take a copy, but he rather thought the former was the fact, and that the plaintiff Fynney did not see the original, though he could not say positively; that the plaintiff accordingly furnished the glass and earthenware, the amount of which, deducting the discount, was 193*l.* 7*s.* 8*d.*, but adding the discount, 219*l.* 10*s.*, and rendered invoices thereof to M'Kune, headed thus: "Mr. Thomas M'Kune bought of John and James Davenport" (which was the plaintiffs' firm); that M'Kune entered the net amount (193*l.* 7*s.* 8*d.*) to the credit of the plaintiffs in an account with them in his books, and charged the same sum, with the addition of 2 per cent. for the commission, to the debit of the defendant in an account with him, which was according to his invariable course of dealing; and that he sent to the defendant a general invoice of all the goods purchased, comprising the glass and earthenware, but not mentioning the plaintiffs' names; that afterwards, in April, 1823, and before the credit for the goods had expired, M'Kune became insolvent, though up to the day of his stopping payment he was in good credit, and could have bought goods on trust to the amount of 20,000*l.* whereupon the said mayor and bailiffs, by the said recorder, after stating the evidence, told the jury that, from the distance of time since the sale took place, there was some uncertainty in the evidence of M'Kune as to the precise words used by him to the plaintiffs at the time he gave them the order for the goods: but it appeared to them (the said re-

corder) upon the evidence, that the name of the defendant as principal was not then communicated or known to the plaintiffs; and directed the jury, that if they were of opinion that the defendant's name as principal was mentioned by M'Kune to the plaintiffs at the time the order was given, or that the plaintiffs then knew that the defendant was the principal, their verdict ought to be for the defendant: but if they were of opinion that the defendant's name as the principal was not mentioned by M'Kune to the plaintiffs at the time of the order being given, and that the plaintiffs did not then know that the defendant was the principal, and they did not think, upon all the said facts of the case that the plaintiffs, at the time of the order being given, knew who the principal was, so that they then had a power of electing whether they would debit the defendant or M'Kune, they ought to find a verdict for the plaintiffs; and that, although the plaintiffs at the time of the sale might think that M'Kune was not buying the goods upon his own account, yet if his principal was not communicated or made known to them, that circumstance ought to make no difference in the case. The jury, after finding as a fact that the letter containing the order was not shewn and made known to the plaintiffs, gave their verdict for the plaintiffs below for 219*l.* 10*s.* It was contended, that the mayor and bailiffs, by the recorder, ought to have directed the jury that if they were satisfied that Davenport, &c. at the time of the order being given knew that M'Kune was buying the goods as an agent, even though his principal was not communicated or made known to them, they, by afterwards debiting M'Kune, and so rendering the said invoices, had elected to take him for their debtor, and had precluded themselves from calling on Thomson.

Joy, for the plaintiff in error.—Davenport and Co., the seller of these goods, knowing that M'Kune was an agent, and electing to take him as their debtor, cannot now resort to Thomson. The two following propositions will not be disputed. Where the seller of goods, knowing that the buyer, though dealing in his own name, is, in truth, the agent of another, elects to give the credit to such buyer, he cannot afterwards recover their value from the principal. On the other hand, if the seller be ignorant at the time of the sale that the purchaser is buying for another person, that person may be sued, unless where the seller may have

abandoned his right to resort to him. Of these two propositions, the first is absolute; the second conditional. It will be contended, that this is an intermediate case, and altogether new. But it clearly falls within the first of the above propositions; or, if it can be said to range between them at all, it is not equidistant, but approximates to the first more nearly than to the second. Or, thirdly, if it were practicable to force it nearer to the second, this case would clearly fall within the condition. Here the sellers were distinctly informed, that the buyer was in truth the agent of another, and yet they elected to give credit to such agent. They have, therefore, thus precluded themselves from recovering over against the principal. They chose to treat the agent as their debtor, with a full knowledge that the goods were for another. They were so satisfied to have the agent for their debtor, that they did not even ask the name of his principal. It was natural they should prefer him to a house at Dumfries, the members of which resided out of the reach of the laws of England. It will be said, that they could not elect to take him as their debtor, because the name of the principal was not mentioned. But that was the fault of the sellers: they did not ask the name. They were told the goods were for a house at Dumfries. There was no attempt at concealment on the part of the buyer. If they had not fully decided, at the time of making the contract, to prefer M'Kune to any house in Dumfries, they would surely have inquired for *what* house he was acting. This omission made their preference of him manifest. They knew not only that M'Kune was buying for another, but they knew also the description of that other, *viz.*, a house in Dumfries. Beyond this, what was there in the name? Or, if anything worth their knowing, their ignorance of it was solely imputable to their own *laches*. *Caveat venditor*. If they wilfully closed their eyes against further light *then*, they cannot *now* complain that it was imperfect. But they had abundant information whereon to exercise an election, and by their conduct they have shown that they preferred to take M'Kune as their debtor. The name of the principal is wholly immaterial, if the sellers, knowing that there *is* a principal, elect to take the agent as their debtor. If this case, therefore, come nearer to the second proposition, the sellers must be held to have abandoned their right to resort to the principal. This doctrine is fully established

(a) 15 East, 62, *ante*, 197.
(b) 4 Taunt. 574, *ante*, 205.
(c) 1 East, 335.

by *Paterson* v. *Gandasequi* (a), and *Addison* v. *Gandasequi* (b); and partially confirmed by *Maanss* v. *Henderson* (c), where it was held to be a sufficient intimation of the agent's character, that he, in time of war, described a ship as neutral. It is consonant to the general principle of the law merchant, as evinced by its admission in the case of foreign principals. And as, in respect to the difference of courts and the difficulties of executing process, a Scotchman domiciled in Dumfries stands much in the same position as a foreigner, the same rule should hold as to both. In point of law, therefore, this doctrine is consistent with the decisions in analogous cases; in point of commercial policy, it is expedient; and in point of equity, between these parties, it is just.

Patteson, contrà. It is undoubtedly established by the authorities, that if the seller knows that there is a principal, and also who that principal is, and afterwards gives credit to the agent, he thereby makes his election, and abandons his right to resort to the principal. But in this case, the seller did not, either at the time of the sale or at the time when he gave credit to the agent, know the name of the principal; he had not, therefore, the power of making any election. This case, therefore, does not fall within the authorities cited. On the other hand, it is clearly established, that if the seller does not, at the time of the sale, know that the buyer is an agent, he may, when he discovers the fact, sue the principal, although in the meantime he has given credit to the agent. The present is an intermediate case, for here the seller knew at the time of the sale, that the buyer was an agent, but did not know for whom he was agent. The seller was not bound to inquire the name of the principal: and therefore this case belongs to the latter, rather than the former class. The seller cannot make his election between the agent and principal until he knows who the principal is; for the election implies a comparison of their individual credit. The right to resort to the principal could be determined only by reason of the seller having exercised an election, and that right was not put an end to in this case, because no election was or could be exercised. Neither is the buyer injured by the seller suing the principal; the credit had not expired when the action was commenced, nor had the buyer settled any account with his principal. The buyer, therefore,

is not in a worse situation than he was before. *Wilson* v. *Hart* (*a*), and *Seymour* v. *Pychlau* (*b*), show that the rule, as to discharging the principal, is not to be extended. As to the argument from inconvenience, if an unknown principal is not to be liable when discovered, great inconvenience will follow. The majority of contracts are made by agents who are known to be agents, but the names of their principals are not known. In *Moore* v. *Clementson* (*c*) it was held, that although a factor sells goods as a principal, yet, if, before they are all delivered, and before any part of them is paid for, the purchaser is informed that they belong to a third person, in an action by the latter for the price of them, the purchaser cannot set off a debt due to him from the factor. Lord *Ellenborough* there says, "A man who is in the habit of selling the goods of others, may likewise sell goods of his own; and where he sells goods as a principal, with the sanction of the real owner, the purchaser, who is thus led to give him credit, shall on no account afterwards be deprived of his set-off by the intervention of a third person. But here there was express notice to the purchaser, before the contract was completed, that Green, in this particular transaction, acted only as a factor." In *Railton* v. *Hodgson* (*d*), the sellers gave credit to Smith, Lindsay and Co.; but it was held, they might maintain an action against the defendant, who had had the goods. The defendant here has had the goods, and in justice ought to pay for them, unless the plaintiff has done anything to preclude himself from suing, or unless it be shown that by suing the defendants he is altering the rights of other parties, and neither of those things can be shown.

(*a*) 7 Taunt. 296.
(*b*) 1 B. & A. 14.
(*c*) 2 Campb. 22.
(*d*) Cited in *Paterson* v. *Gandasequi*, and reported *ante*, 207, *in notâ*.

Lord *Tenterden*, C. J.—I am of opinion that the direction given by the learned Recorder in this case was right, and that the verdict was also right. I take it to be a general rule, that if a person sells goods (supposing at the time of the contract he is dealing with a principal), but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the mean time have debited the agent with it, he may afterwards recover the amount from the real principal: subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal. On the other hand, if at the time of the sale the

seller knows, not only that the person who is nominally dealing with him is not principal but agent, and also knows who the principal really is, and, notwithstanding all that knowledge, chooses to make the agent his debtor, dealing with him and him alone, then, according to the cases of *Addison* v. *Gandasequi* (*a*), and *Paterson* v. *Gandasequi* (*b*), the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other. The present is a middle case. At the time of the dealing for the goods, the plaintiffs were informed that M'Kune, who came to them to buy the goods, was dealing for another, that is, that he was an agent, but they were not informed *who* the principal was. They had not, therefore, at that time the means of making their election. It is true that they might, perhaps, have obtained those means if they had made further inquiry; but they made no further inquiry. Not knowing who the principal really was, they had not the power at that instant of making their election. That being so, it seems to me that this middle case falls in substance and effect within the first proposition which I have mentioned, the case of a person not known to be an agent; and not within the second, where the buyer is not merely known to be agent, but the name of his principal is also known. There may be another case, and that is where a British merchant is buying for a foreigner. According to the universal understanding of merchants, and of all persons in trade, the credit is then considered to be given to the British buyer, and not to the foreigner. In this case, the buyers lived at Dumfries; and a question might have been raised for the consideration of the jury, Whether, in consequence of their living at Dumfries, it may not have been understood among all persons at Liverpool, where there are great dealings with Scotch houses, that the plaintiffs had given credit to M'Kune only, and not to a person living, though not in a foreign country, yet, in that part of the king's dominions which rendered him not amenable to any process of our courts? But instead of directing the attention of the Recorder to any matter of that nature, the point insisted upon by the learned counsel at the trial was, that it ought to have been part of the direction to the jury, that if they were satisfied the plaintiffs, at

(*a*) 4 Taunt. 574.
(*b*) 15 East, 62.

the time of the order being given, knew that M'Kune was buying goods for another, even though his principal might not be made known to them, they, by afterwards debiting M'Kune, had elected him for their debtor. The point made by the defendant's counsel, therefore, was, that if the plaintiffs knew that M'Kune was dealing with them as agent, though they did not know the name of the principal, they could not turn round on him. The Recorder thought otherwise: he thought that though they did know that M'Kune was buying as agent, yet, if they did not know who his principal really was, so as to be able to write him down as their debtor, the defendant was liable, and so he left the question to the jury, and I think he did right in so doing. The judgment of the court below must therefore be affirmed.

Bayley, J.—There may be a course of trade by which the seller will be confined to the agent who is buying, and not be at liberty at all to look to the principal. Generally speaking, that is the case where an agent here buys for a house abroad. There may also have been evidence of a course of trade, applicable to an agent living here acting for a firm resident in Scotland. But that does not appear to have been made a point in this case, and it is not included in the objection which is now made to the charge of the Recorder. In my opinion, the direction of the Recorder was right; and it was, with the limits I have mentioned, perfectly consistent with the justice of the case. Where a purchase is made by an agent, the agent does not of necessity so contract as to make himself personally liable; but he *may* do so. If he does make himself personally liable, it does not follow that the principal may not be liable also, subject to this qualification, that the principal shall not be prejudiced by being made personally liable, if the justice of the case is that he should not be personally liable. If the principal has paid the agent, or if the state of accounts between the agent here and the principal would make it unjust that the seller should call on the principal, the fact of payment, or such a state of accounts, would be an answer to the action brought by the seller where he had looked to the responsibility of the agent. But the seller, who knows who the principal is, and instead of debiting that principal, debits

the agent, is considered, according to the authorities which have been referred to, as consenting to look to the agent only, and is thereby precluded from looking to the principal. But there are cases which establish this position, that although he debits the agent who has contracted in such a way as to make himself personally liable, yet, unless the seller does something to exonerate the principal, and to say that he will look to the agent only, he is at liberty to look to the principal when that principal is discovered. In the present case the seller knew that there was a principal; but there is no authority to show that mere knowledge that there is a principal, destroys the right of the seller to look to that principal as soon as he knows who that principal is, provided he did not know who he was at the time when the purchase was originally made. It is said, that the seller ought to have asked the name of the principal, and charged him with the price of the goods. By omitting to do so, he might have lost his right to claim payment from the principal, had the latter paid the agent, or had the state of the accounts between principal and the agent been such as to make it unjust that the former should be called upon to make the payment. But in a case circumstanced as this case is, where it does not appear but that the man who has had the goods has not paid for them, what is the justice of the case? That he should pay for them to the seller, or to the insolvent agent, or to the estate of the insolvent agent, who has made no payment in respect of these goods? The justice of the case is, as it seems to me, all on one side, namely, that the seller shall be paid, and that the buyer (the principal) shall be the person to pay him, provided he has not paid any body else. Now, upon the evidence, it appears that the defendant had the goods, and has not paid for them, either to M'Kune or to the present plaintiffs, or to any body else. He will be liable to pay for them either to the plaintiffs or to M'Kune's estate. The justice of the case, as it seems to me, is, that he should pay the plaintiffs who were the sellers, and not any other persons. I am, therefore, of opinion that the direction of the Recorder was right.

Littledale, J.—The general principle of law is, that the seller shall have his remedy against the principal, rather than against any other person. Where goods are bought

by an agent, who does not at the time disclose that he is acting as agent; the vendor, although he has debited the agent, may, upon discovering the principal, resort to him for payment. But if the principal be known to the seller at the time when he makes the contract, and he, with a full knowledge of the principal, chooses to debit the agent, he thereby makes his election, and cannot afterwards charge the principal. Or if in such case he debits the principal, he cannot afterwards charge the agent. There is a third case. The seller may, in his invoice and bill of parcels, mention both principal and agent: he may debit A. as a purchaser for goods bought through B., his agent. In that case, he thereby makes his election to charge the principal, and cannot afterwards resort to the agent. The general principle is, that the seller shall have his remedy against the principal, although he may, by electing to take the agent as his debtor, abandon his right against the principal. The present case differs from any of those which I have mentioned. Here the agent purchased the goods in his own name. The name of the principal was not then known to the seller, but it afterwards came to his knowledge. It seems to me to be more consistent with the general principle of law, that the seller shall have his remedy against the principal, rather than against any other person, to hold in this case that the seller, who knew that there was a principal, but did not know who that principal was, may resort to him as soon as he is discovered. Here the agent did not communicate to the seller sufficient information to enable him to debit any other individual. The seller was in the same situation, as if at the time of the contract he had not known that there was any principal besides the person with whom he was dealing, and had afterwards discovered that the goods had been purchased on account of another; and, in that case, it is clear that he might have charged the principal. It is said, that he ought to have ascertained, by inquiry of the agent, who the principal was, but I think that he was not bound to make such inquiry, and that by debiting the agent with the price of the goods, he has not precluded himself from resorting to the principal, whose name was not disclosed to him. It might have been made a question, whether it was not a defence to this action that the principal resided in Scotland. But that was not a point

made at the trial, nor noticed in the bill of exceptions; we cannot, therefore, take it into our consideration. For the reasons already given, I think the plaintiff is entitled to recover.

Judgment affirmed.

Parke, J., having been concerned as counsel in the cause, gave no opinion.

THESE three cases are printed together and at length, since they are almost always cited at the same time, and, taken together, they comprise most of the law on the point to which they relate, namely, *the liability of an unnamed principal when discovered.* A very elaborate judgment upon a point nearly connected with this subject, was delivered by Baron *Parke*, in *Thomas* v. *Edwards*, 2 Mee & Welsb. 216. In that case, a person named Miller, by the direction of an election committee, of which the defendant was chairman, opened several public-houses, including that of the defendant's testatrix. The action was brought against the defendant for the meat and drink supplied. On a motion for a new trial, *Parke*, B., stated the following rules for the guidance of the sheriff, by whom the issue was to be tried: "The plaintiff must prove an express contract, or a contract implied between the defendant and his testatrix, to pay for the meat and drink supplied by her to the voters. The burden of proof is on the plaintiff. The first question will be—*whether any contract at all was entered into with the plaintiff's testatrix?* If she supplied the meat and drink to the voters, *on a mere speculation* that the candidate, or some one interested in the election, would, *as a matter of honour*, pay for them, no contract was thereby created with any one. But if she supplied them by the order of another, *looking to be paid as a matter of right*, a contract would be implied. On the supposition that a contract *was* entered into, the next question is, *with whom that contract was made?* The voters were certainly not contracting parties. Miller, the person who gave the order, was *primâ facie* the contracting party with the plaintiff's testatrix. But if the plaintiff shows, that Miller was acting as the agent of another in giving that order, the principal is the person ordering in point of law, and is, therefore, the contracting party. If then it is proved, that Miller was employed by the defendant alone, or by the defendant and others, to give the order, and that the defendant himself was not acting, in so employing Miller, as agent for any one else, then the defendant is the principal, and is liable, *whether he intended, or not, to pledge his personal responsibility. He is responsible if he be a principal; and he is so, unless he himself be an agent for another.* The same consequence will follow if Miller was not a mere agent, but acted jointly with the defendant, or with the defendant and others, in giving the order. If it should appear, that the testatrix considered Miller as acting on behalf of the candidate, and trusted him, by supplying goods to the voters, on the supposition that he was authorised to contract on his behalf, it would make no difference though the contract with the candidate would have been illegal; for, on proof by the plaintiff that Miller was not so authorised, the plaintiff would establish that the contract was *not* with the candidate, though the testatrix supposed it to be; and there would, therefore, be no illegality in the contract *actually made*, and no policy of the law would prevent an action being brought upon it. . . . In addition to the cases of *Peele* v. *Hodgson* and *Railton* v. *Hodgson*, cited in the argument as to

the liability of *one who was the real principal, though he was believed to be agent for another*, I may mention the *dictum* of Lord *Holt*, Holt, 309, who says, "If A. employs B. to work for C. without warrant from C., A. is liable to pay for it." From this case, added to those in the text, we may infer:—

1. That where A. contracts with B., without stating himself to be an agent, B. may, on discovering his principal, elect between them.

2. That the rule is the same where he states himself to be an agent, but does not name his principal.

3. That if he state himself to be an agent, but have really no principal, he is, in law, himself the principal.

One of the shapes in which the question of the personal liability of an unauthorised person acting as agent sometimes presents itself, is where he has, without authority, signed a third person's name to some negotiable instrument. In *Wilson* v. *Barthrop*, 2 M. & W. 863, a clerk, who had authority to sign for general purposes, drew a bill in the name of the firm, and was sued personally on it. But the case went off, on the ground that it did not clearly appear, that he had acted without authority. In *Polhill* v. *Walter*, 2 B. & Ad. 114, the question was incidentally discussed, whether a man accepting a bill without authority would be personally liable. The court said, no person could be liable, *as acceptor*, unless for honour, except the drawee of the bill. In the course of the argument, p. 120, a case is cited by Sir *J. Scarlett*, where the American courts held, that a man making a note in the name of another, without authority, is liable personally, as maker.

Very similar to the last of the three rules above laid down, is the doctrine in those cases which have been said to warrant the proposition, that where one man *by fraud* induces another to supply goods to a person with whom he would not have dealt had it not been for such fraud, that there the vendor, on discovery of the fraud, may treat him as a principal, and sue him in *indebitatus assumpsit* for goods sold and delivered, if he have himself taken possession of the articles supplied. See *Biddle* v. *Levy*, 1 Stark. 20; *Hill* v. *Perrott*, 3 Taunt. 274; *Lucas* v. *Godwin*, 3 Bingh. N. C. 741; and *Wilson* v. *Hart*, *post*. It may be a question of some curiosity, how far this doctrine, if pushed far, might affect the operation of the stat. 9 G. 4, c. 14, s. 6, set out and commented upon in the note to *Chandelor* v. *Lopus*, vol. i. p. 79.

Although the person who has dealt with an agent, believing him to be a principal, may elect to treat the after-discovered principal as having contracted with him; still, if the principal, *following the ordinary course of business*, have, *after his liability to the contractor is complete*, altered the state of his accounts with the agent, this right of the contractor exists, subject to the state of those accounts. This is laid down in the text of *Thomson* v. *Davenport*. In *Kymer* v. *Suwercropp*, 1 Campb. 109, on the 10th, 17th, and 24th of June, Kenyon and Co., as brokers for the defendant, bought coffee from the plaintiff, who did not, however, discover the agency till the 8th of July, on which day Kenyon and Co. became insolvent; part of the coffee the defendant had received, and had paid Kenyon and Co. for it, by an acceptance at one month, dated 15th of June, which was cashed when due. At the expiration of one month from each of the respective days of sale, which were respectively the *days of prompt* in that trade, the plaintiff demanded payment from the defendant. Lord *Ellenborough* held the defendant liable for the price. "A person," said his lordship, "selling goods is not confined to the credit of a broker who buys them, but may resort to the principal on whose account they are bought. . . . If he lets the day of payment go by, he may lead the principal into the supposition, that he relies solely on the broker; and if in this case the price of the goods has been paid to the broker, on account of the deception the principal shall be discharged. But here payment was demanded from the defendant on the several days when it became due, and no reason was given him to believe that his broker alone was trusted." In the above sentences his lordship laid down the general rule, the exception, and the limitation to that ex-

ception: the general rule being, that the contractor may elect between the agent and the unknown principal, upon the discovery of the latter; the exception, that if the state of the accounts between the principal and agent have been altered, he elects, subject to the state of those accounts; and the limitation to that exception, that the alteration in the state of the accounts must, in order to deprive the contractor of his election, be made after the liability of the principal has accrued, that is, after the right of acting upon the election has once vested.

Some difficulty has been thought to surround the subject-matter of this note (namely, the creditor's right of election), arising out of that inflexible rule of the law of evidence, commented on in *Wigglesworth* v. *Dallison*, *ante*, vol. i., *viz.* that the terms of a written contract cannot be qualified, or contradicted, by parol testimony. It has been said, if A. contract in writing without naming his principal, so that he appears upon the writing to be himself the principal—does not a creditor who seeks to show, that while thus professedly contracting for himself, he *really* contracted for a principal, endeavour to infringe this rule of evidence, by adding to the written contract a new term at variance with the written terms? This question, it is however apprehended, must receive different answers upon different occasions, answers varying according to the object with which it is sought to introduce the parol testimony, which, it is submitted, never can be heard for the purpose of *dis*charging the agent, but may always be so for that of charging the principal.

That parol evidence can never be admitted for the purpose of exonerating an agent who has entered into a written contract in which he appears as principal, even though he should propose to shew, if allowed, that he mentioned his principal at the time of entering into it, seems to be now well-established. The cases of *Ledbitter* v. *Farrow*, 5 M. & S. 345; *Lefevre* v. *Lloyd*, 5 Taunt. 749; *Sowerby* v. *Butcher*, 1 C. & Mee, 371 and 4 Tyrwh. 320, shew that an agent, drawing, accepting, or indorsing negotiable securities in his own name, is personally liable upon them to the holder. In *Magee* v. *Atkinson*, 2 Mee & Welsb. 440, on the trial of an action of assumpsit for the non-delivery of railway shares, it appeared, that the defendant, who was a share-broker, sold the shares in question, on account of Mr. Jacob, to Scholes the plaintiff's agent; he then returned home, and informed his clerk that he had sold the shares to Scholes, on which the clerk entered in the book a sale from the defendant to Scholes, and a contract note to the same effect was sent to Scholes. The defendant shortly afterwards altered the book by inserting Jacob's name as seller, and sent another note to Scholes, in which Jacob appeared as seller. On these facts, *Patteson*, J., left it to the jury to say whether the second note was a correction of a mistake in the first; and he told them "that if the defendant entered into a written contract in his own name, he could not afterwards set up that he was acting as a broker merely; and, though known to be an agent, if the defendant signed the contract in his own name, he was liable." Evidence was tendered to shew a custom to send in broker's notes without disclosing the principal's name, but this evidence was rejected. The jury found a verdict for the plaintiff, and the Court of Exchequer approved of the direction of the learned judge, and refused a rule for a new trial. "I do not see," said *Parke*, B., "any default in the rejection of the evidence, because the evidence tendered was to alter the written contract." "The custom offered to be proved," said *Alderson*, B., "was a custom to violate the common law of England."

On the motion for a new trial in the above case, *Wilson* v. *Hart*, 7 Taunt. 295, was cited as an authority in favour of the admissibility of the parol evidence. This case has occasioned some confusion, arising mainly from the too great generality of the marginal note, in which it is broadly stated, that "the Statute of Frauds does not exclude parol evidence that a contract for the sale of goods, purporting to have been made between A., the seller, and B., the buyer, was, on B.'s part, made by him only as agent for C." On examination, however, it will be found to be no *direct* authority as to the admissibility of

the evidence in any case; and so far as it is of weight upon this subject, it will be found to support only the second of the two propositions above submitted, namely, that the parol evidence may be admitted to charge the principal, though not to *dis*charge the agent. In *Wilson* v. *Hart*, a person of the name of Read, being indebted to Hart, who was pressing him for payment, said, he thought he could get credit for wool, which Hart wanted, and accordingly procured a broker to purchase some from Clarke, telling the broker that he was commissioned to buy it by Hart. The broker bought it, it having been previously inspected by Hart, and the bought note and invoice both named Read as the buyer. In an action brought by the assignees of Clarke, the seller of the wool, against Hart, for the price, the L. C. J. *Gibbs* told the jury "that the question for them was, whether it was a sale to the defendant or to Read; if they thought it was a fraud between the defendant and Read, to pay the defendant's debt with Clarke's wool, they might find for the plaintiff. The written documents favoured the defendant's case, but if the jury thought that the defendant had all along intermeddled with the sale, and induced the plaintiff to think he was going to pay for them, notwithstanding the sale was in form to Read, they might find for the plaintiffs." The jury found a verdict for the plaintiffs, and a motion was made for a new trial on the ground, 1st. That there was no contract between Clarke and the defendant within the 17th section of the statute of frauds; 2dly, That parol evidence ought not to have been received for the purpose of altering the effect of the written contract. The court refused the rule.

Now it is plain that in deciding the above case, it was not necessary to go further than to say that where a man gets goods into his hands by fraud, he may be charged with their price in assumpsit. So far this case is an authority in support of the doctrine deduced, in a former part of this note, from *Biddle* v. *Levy*, *Hill* v. *Perrott*, and *Lucas* v. *Godwin*, and could involve no question concerning the written contract, because the *assumpsit* would be raised, not out of that or by its aid, but from the acts of the defendant, in possessing himself of the goods by means of a delusion practised upon Clarke. Such was, moreover, the view taken by the court. "The case was left to the jury," says *Dallas*, J., "*on a question of fraud*, and the jury have, on the whole, drawn a conclusion, that this was a contrivance between the defendant and Read, for the purpose I have mentioned, and this was legitimately a question for the jury." It is true that *Park*, J., says in his judgment, "It is the constant course to show by parol evidence whether a contracting party is agent or principal. The evidence is properly admitted." The decision of the case, however, turned, as has been shewn, altogether upon the fraud. But, even had it turned upon the admissibility of the evidence, it would not have been at all at variance with *Magee* v. *Atkinson*, since the evidence would have been admitted not to *dis*charge Read, but to charge Hart.

The next proposition above submitted, is, that parol evidence that the person who has signed as principal was in reality an agent, ought not to be excluded, when the purpose for which it is offered is that of charging the principal with the contract. The principle on which it is submitted that this depends, is adverted to in the text of *Paterson* v. *Gandasequi*, which states that "it was moved to set aside the nonsuit, on the ground of assimilating this case of a dormant principal to that of a dormant partner, where, though the person furnishing goods to the ostensible partners, intended, at the time, to give credit only to them, yet he may afterwards pursue his remedy against the dormant partner when discovered." And this, it is submitted, is the true principle. A dormant partner is sued on the ground of agency; he is liable on a contract relating to the firm made in the ostensible partner's name alone, because he is taken to have adopted the name of the ostensible partner as his own, for the purpose of such contracts. So that when the ostensible partner signs his name to such contracts, he signs a word, the meaning of which comprehends not himself alone, but his partner also. It is in fact, a question of signification. A. and B. trade under the name "A."; the name "A.", therefore, when used in a contract relating to such

trade, means "A. & B."; and to shew that it has such meaning, parol evidence is admissible, but admissible only for the purpose of charging B., for *De Mautort* v. *Sanders*, 1 B. & Ad. 398, decides, that it cannot be admitted to *dis*charge the ostensible partner. Now, if B. may contract jointly with A., under the name of A., and employ A. to sign it, there is no reason why he should not contract individually in the same way, and if he may do so, then parol evidence must be admissible to shew that A., being his agent, so contracted for him.

This view will be, it is submitted, borne out by an examination of the authorities. In *Paterson* v. *Gandasequi*, the order for the goods for which the action was brought was in writing, signed only by Lazarabal and Co.: no objection was made to the admissibility of the parol evidence. In *Thomson* v. *Davenport*, *Railton* v. *Peele*, and *Railton* v. *Hodson*, the invoices which appear to have contained the terms of the contracts, were made out to the respective agents. The case of *Short* v. *Spackman*, 2 B. & Adol. 962, has considerable bearing on these points. The plaintiffs, being employed by Hudson to buy oils, employed one Bentley to effect a purchase for them; Bentley applied to the defendants, who refused to sell to the plaintiffs, but being informed they had a principal, consented, and made out the bought and sold notes to the plaintiffs, as principals. Hudson refused to ratify the purchase, on which, the plaintiffs took to it for their own benefit, demanded the oils, and brought an action against the defendants for not delivering them. It was objected that the defendants had expressly refused to deal with the plaintiffs as principals; the form of the written contract (the bought and sold notes) in which they appeared as principals, was, however, held to entitle them to sue; and *Parke*, J., in his judgment, says, "It is found that the plaintiffs were authorised by Hudson to buy oil of the defendant, *and the contract was binding both on them, and, if the defendant chose to enforce it, on Hudson.*"

It is for the above dictum of *Parke*, J., that *Short* v. *Spackman* is cited: the decision of the case turns, as will be perceived, upon the right of the agent to sue upon the contract in his own name. That an agent who has made a contract in his own name for an undisclosed principal, may sue on it in his own name, is established by several cases, particularly the late one of *Sims* v. *Bond*, 5 B. & Ad. 393. "It is," said the Lord *Chief Justice*, delivering the judgment of the court in that case, after a *cur. adv. vult.*, "a well-established rule of law, that where *a contract not under seal* is made by an agent in his own name for an undisclosed principal, *either the agent or the principal may sue on it;* the defendant, in the latter case, being entitled to be placed in the same situation, at the time of the disclosure of the real principal, as if the agent had been the contracting party. This rule is most frequently acted on in sales by factors, agents, or partners, in which cases either the nominal or real contractor may sue. But it may be equally applied to other cases." See also *Alexander* v. *Barker*, 2 Tyrwh. R. 146; *Sims* v. *Brittain*, 4 B. & Ad. 375; *Bastable* v. *Poole*, 5 Tyrwh. 111. Now as far as the admissibility of the parol evidence to qualify the written contract is concerned, there is as much objection to letting it in for the purpose of enabling the principal not named in the contract itself to sue, as for the purpose of rendering him liable to be sued. But the true rule, it is submitted, is, that the parol evidence is admissible for the purpose of *charging*, but never of *dis*charging either party to the contract.

But it is not merely in cases where the agent has contracted in his own name for an unnamed principal, that he has a right to sue at law upon the contract. When he has made a contract, in the subject-matter of which he has a special property, he may even, though he contracted for an avowed principal, sue in his own name. *Williams* v. *Millington*, 1 H. Bl. 81, is the leading case on this subject. There the plaintiff, an auctioneer, was employed by Crown to sell his goods. *The sale was at Crown's house, and the goods known to be his property.* The plaintiff brought an action against the defendant, who had purchased some part of the goods, for goods sold and delivered, and obtained a verdict, which the court refused to set aside. "An auctioneer," said Lord *Loughborough*, "has a *possession, coupled with an*

interest, in goods which he is employed to sell, not a bare *custody*, like a servant or shopman. There is no difference, whether the sale be on the premises of the owner or at a public auction-room; for, on the premises of the owner, an actual possession is given to the auctioneer and his servants by the owner, not merely an authority to sell. I have said a possession coupled with an interest; but an auctioneer has also a *special property* in him, with a lien for the charges of the sale, the commission, and the auction duty, which he is bound to pay. . . . It is not a true position that two persons cannot bring separate actions for the same cause: the carrier, and the owner of goods, may each bring actions on a tort; the factor and owner may each have actions on a contract: I am, therefore, upon the whole, decidedly of opinion that this action may well be maintained."

But there is an objection of a peculiar nature to suing in the name of an auctioneer: for sales by auction are within the 17th section of the Statute of Frauds, so that the contract created by such sale must be evidenced by a memorandum in writing signed by the party to be charged, or by his agent. Now, it is well known that the auctioneer is on these occasions the agent for the purchaser to sign the contract, as well as of the seller to sell the goods; so that his entry in his book binds the purchaser, and is a sufficient memorandum of the contract. But it has been held that when the purchaser is sued in the auctioneer's name, this memorandum is insufficient: for the auctioneer, by bringing the action, affirms himself to be the vendor, and so causes the case to fall within the rule that the vendor cannot be an agent for the purchaser within the meaning of the statute; *Farebrother* v. *Simmons*, 5 B. & A. 33. This decision seems to have been regretted, and it is otherwise if the name was written contemporaneously with the sale not by the auctioneer, but by his clerk; *Bird* v. *Boulter*, 4 B. & Ad. 443.

In every case in which the agent sues in his own name, two consequences, it must be remembered, follow. 1. That the defendant may avail himself of those defences which would be good as against the agent who is the plaintiff on the record; *Gibson* v. *Winter*, 5 B. & Ad. 96, and *Bauerman* v. *Radenius*, *post* 228. 2. That he may avail himself of those which would be good as against the principal for whose use the action is brought. See *Welstead* v. *Levy*, 1 M. & Rob. 138; *Megginson* v. *Harper*, 4 Tyrwh. 94; *R.* v. *Hardwick*, 11 East, 578; *Harrison* v. *Vallance*, 1 Bing. 45; *Smith* v. *Lyon*, 3 Campb. 465.

Where the agent has contracted for an undisclosed principal, and that principal thinks proper to sue on the contract in his own name, he does so, subject to those rights which the defendant might have exercised against the agent at the time of the disclosure, had that agent been really a principal. This is a part of the rule laid down by the court in *Sims* v. *Bond*, and above quoted. Thus, if a factor sell as principal, the vendee, on the true principal afterwards discovering himself, may avail himself of payment to, or set off a demand upon, the factor; *Stracy* v. *Decy*, 7 T. R. 361; *George* v. *Claggett*, 7 T. R. 359, *ante* p. 77, *et notas*; *Coates* v. *Lewis*, 1 Camp. 444; *Blackburne* v. *Scholes*, 2 Camp. 343; *Carr* v. *Hinchcliffe*, 4 B. & C. 551; *Taylor* v. *Kymer*, 3 B. & Ad. 334; *Bastable* v. *Poole*, 5 Tyrwh. 111. It was once attempted to extend this doctrine so as to allow a set-off against a trustee of money due from the *cestui que trust*; *Bottomley* v. *Brook*, 1 T. R. 621; *Rudge* v. *Birch*, *ibid.* 622. But these cases have been disapproved of; *Tucker* v. *Tucker*, 4 B. & Ad. 745; and see Lord *Ellenborough's* observations in *Wake* v. *Tinkler*, 16 East, 36.

BAUERMAN *v.* RADENIUS.

TRINITY, 38 *G.* 3.—*K. B.*

[REPORTED 7 T. R. 663.]

The defendant may give in evidence the declarations or admissions of the plaintiff on the record to defeat the action, although such plaintiff appear to be only a trustee for a third person.

THIS was an action on the case, wherein the declaration stated, that in consideration that the plaintiffs had shipped on board a certain vessel then lying at Embden, and whereof the defendant was master, certain goods to be carried from thence to London, there to be delivered in good condition and dry (except in case of inevitable damage or leakage) to Messrs. Van Dyck and Co. for a certain reasonable freight to be paid to the defendant, the defendant promised to carry and deliver the same accordingly; that the ship with the goods arrived safely from Embden at London; and although Messrs. Van Dyck and Co. paid the freight for the same, yet the defendant did not deliver the goods in good condition and dry, although not prevented from so doing by inevitable damage or leakage, but on the contrary delivered the same wet and ill-conditioned, and the said goods were through the same neglect and default of the defendant much damaged and spoiled, &c. To this the general issue was pleaded.

At the trial before Lord *Kenyon* at Guildhall, much evidence was at first gone into in order to show that the injury arose from the unskilful stowing of the goods on board the vessel, and not from the inevitable danger of the sea, as the defendant endeavoured to establish. But the principal question arose on the production to evidence by the defendant of a letter from the plaintiffs, who were the shippers of

the goods to Van Dyck and Co., entirely exculpating the defendant from all blame or imputation of negligence or misconduct, and stating that he acted in every respect according to their (the plaintiffs') orders by stowing the goods under their direction. But it also appeared in the same letter that Van Dyck and Co. were the persons on whose risk the goods were shipped, that they were the persons really interested in the suit, and had indemnified the plaintiffs, their agents, in whose names they had brought this action. Whereupon it was contended at the trial, in support of the action, that as it was disclosed that Van Dyck and Co. were the real plaintiffs, and the nominal plaintiffs only their agents, the former ought not to be concluded by the admissions of their agents, proved too by letter without the sanction of an oath, and that therefore this evidence ought to be rejected: but Lord *Kenyon* being of a different opinion, the plaintiff was nonsuited.

Gibbs and *Park* moved yesterday to set aside the nonsuit. The principle has been established in several cases, that it is competent to a court of law to recognise the real parties to a suit, though they are not the nominal parties on the record; and when it is shown who the real parties are, the cause ought to be tried in the same manner as if they were brought formally before the court. In *Winch* v. *Keely* (*a*) the principal case determined was, that the assignor of a chose in action who had become a bankrupt, might notwithstanding maintain an action in his own name against the debtor for the benefit of the assignee. That, indeed, proceeded on the ground that a mere trust did not pass by an assignment under the bankrupt laws: but a case was there cited and recognised by the court, which established the position, that a court of law might take notice of a trust, and consider who the real parties were. That was a case of *Bottomley* v. *Brook*, M. 22 G. 3, C. B., where to debt on bond the defendant pleaded that the bond was given for securing 100*l.* lent by the defendant to one E. Chancellor, and given by her direction to the plaintiff in trust for her; and that E. C., before the action brought, was indebted to the defendant in more money than the amount of the bond. The plaintiff, having demurred, afterwards withdrew his demurrer by advice of the court. The same case was also recognised by this court in another of *Rudge* v. *Birch*,

(*a*) 1 T.R., 619.

M. 25 G. 3, where to debt on bond the defendant pleaded that the bond was given to the plaintiff in trust for A., and that A., at the time of exhibiting the plaintiff's bill, was indebted to the defendant in more money; and this was holden good on demurrer. If these cases be law, they govern the present: for if the court will recognise the real litigant parties, and if the declarations of the agents of Van Dyck and Co. would not have been evidence against them if they had been plaintiffs on the record, which they certainly would not, notwithstanding what was said in *Biggs* v. *Lawrence* (*a*); so neither can they be received in evidence, as it was proved that the nominal plaintiffs were mere trustees, and not the parties really interested in the suit. That part of the case of *Biggs* v. *Lawrence*, passed without much observation, and was not the principal point; and Lord *Kenyon* has frequently ruled the contrary, at the sittings since that time, without its having ever been questioned. The answer given in such cases has always been, that the agent himself might have been subpœnaed as a witness, and therefore what he has been heard to say cannot be evidence, as not being the best. There must be reciprocity in the rule. If a defendant may show who the real plaintiff is, though not the plaintiff on the record, for the purpose of setting off a debt due from the real party, or of giving in evidence declarations of that party, so the real party ought to have the privilege of disclosing himself, so as not to be bound by the declarations of the nominal plaintiff, which, if he had not been such, could not have been given in evidence as the declarations of a mere agent. If it be objected, that by these means the defendant is precluded from calling the agent in whose name the action is brought as a witness, the answer is, that the same effect would be produced in the cases of set-off where the objection was not admitted to prevail. In a case of *Dyke* v. *Aldridge*, before Lord *Mansfield*, where one of the parties was a sheriff who was indemnified by a third person, Lord *Mansfield* permitted the declarations of that third person to be given in evidence against the sheriff.

(*a*) 3 T.R., 454.

Erskine, *Garrow*, and *W. Walton*, now showed cause.—The cases cited of *Bottomley* v. *Brook*, and *Rudge* v. *Birch*, supposing them to be good law, do not come up to the point in dispute: they were a construction upon the statute

of Set-off, which have always been liberally expounded to advance the remedy and repress circuity of actions. But it does not follow that, because a debt against the real party to the action may be set off, therefore the declarations of the plaintiff on record shall not be received in evidence. In those cases also the trust appeared on the face of the record, so that there could be no surprise on the defendant; but here the defendant has no notice but that he is sued by the real party, and consequently prepares his defence accordingly. If this evidence were not admitted, the principal might always obtain an advantage over a defendant who dealt with his agent, by bringing his action in the name of the latter to prevent his being a witness for the defendant, while the defendant would be precluded from giving the declarations of the agent in evidence against the principal. The agent then would be plaintiff, so far as operated to the disadvantage of the defendant, and a stranger to the suit where it would operate to the defendant's advantage that he should be plaintiff. In a case before Lord *Mansfield* (*a*), an action was brought in the name of a nominal plaintiff by persons beneficially interested for whom he was a trustee. At the trial the defendant produced a release from the plaintiff, which Lord *Mansfield* held conclusive; but said that the Court of Chancery, upon application, would make the trustee pay the principal debt, if well founded, and the costs of the suit. Besides, this was evidence on another ground; for the plaintiffs as agents were entrusted with the ordering and conduct of these goods as to the manner of their being shipped; and if the defendant followed their directions, the principal must be bound by their acts: and what can be stronger evidence that the orders which they gave were implicitly complied with, than their own acknowledgment in writing to that effect? It is not pretended that the letter is not evidence to some purpose, and if admitted in evidence at all, its whole contents must be received.

(*a*) This was cited by Mr. Erskine from his recollection of the case.

Lord *Kenyon*, C. J.—This was an action brought by Bauerman and Co., against the defendant Radenius; and in the course of the trial, an admission by the plaintiffs themselves was proved, that there was no colour for the action, which admission was not fraudulently obtained from them, but was the opinion that the plaintiffs really entertained on

the merits of the case. And the only question now is, whether or not that ought to conclude the case against the plaintiffs who made the admission. It was said by a very learned judge, Lord *Macclesfield*, towards the beginning of this century, that the most effectual way of removing landmarks would be by innovating on the rules of evidence; and so I say. I have been in this profession more than forty years, and have practised both in courts of law and equity; and if it had fallen to my lot to form a system of jurisprudence, whether or not I should have thought it advisable to establish two different courts with different jurisdictions, and governed by different rules, it is not necessary to say. But, influenced as I am by certain prejudices that have become inveterate with those who comply with the systems they found established, I find that in these courts proceeding by different rules, a certain combined system of jurisprudence has been framed most beneficial to the people of this country, and which I hope I may be indulged in supposing, has never yet been equalled in any other country on earth. Our courts of law only consider legal rights; our courts of equity have other rules, by which they sometimes supersede those legal rules, and in so doing they act most beneficially for the subject. We all know that, if the courts of law were to take into their consideration all the jurisdiction belonging to courts of equity, many bad consequences would ensue. To mention only the single instance of legacies being left to women who may have married inadvertently: if a court of law could entertain an action for a legacy, the husband would recover it, and the wife might be left destitute: but if it be necessary in such a case to go into equity, that court will not suffer the husband alone to reap the fruits of the legacy given to the wife; for one of its rules is that he who asks equity must do equity, and in such a case they will compel the husband to make a provision for the wife, before they will suffer him to get the money. I exemplify the propriety of keeping the jurisdictions and rules of the different courts distinct, by one out of a multitude of cases that might be adduced. If the parties in this case had gone into equity, and that court had directed an issue to be tried, they might have modified it in any way they thought proper. One of the rules of a court of equity is that they cannot decree against

the oath of the party himself on the evidence of one witness alone without other circumstances: but when the point is doubtful, they send it to be tried at law, directing that the answer of the party shall be read on the trial; so they may order that a party shall not set up a legal term on the trial, or that the plaintiff himself shall be examined: and when the issue comes from a court of equity with any of these directions, the courts of law comply with the terms on which it is so directed to be tried. By these means the ends of justice are attained, without making any of the stubborn rules of law stoop to what is supposed to be the substantial justice of each particular case; and it is wiser so to act than to leave it to the judges of the law to relax from those certain and established rules by which they are sworn to decide. If the question that has been made in this case had arisen before Sir *M. Hale*, or Lords *Holt* or *Hardwicke*, I believe it never would have occurred to them, sitting in a court of law, that they could have gone out of the record, and considered third persons as parties in the cause. Here it has been contended that Bauerman and Co. are to be laid out of the case entirely, and we are desired to substitute Van Dyck and Co. as plaintiffs in their room: but if they may be taken to be off the record, then they may be witnesses, and yet it is not pretended that they could have been examined; the argument, therefore, that asserts that they may be taken from off the record, not holding good to all purposes, fails entirely. I cannot conceive on what ground it can be said that Bauerman and Co. may be considered not as the parties in the cause, for the purpose of rejecting their admissions, and yet as the parties in the cause for the purpose of preventing their being examined as witnesses. I take it to be an incontrovertible rule, that the admission made by a plaintiff on the record, is admissible evidence; and on the trial of this cause there was proof of an admission by the plaintiffs that they had no ground upon which to support the action. With regard to the case of *Biggs* v. *Lawrence*, which was cited to show that an acknowledgment made by the defendant's agent was evidence against the principal, it is sufficient to say that that was not the point on which the case was argued or determined in this court. It is my wish and my comfort to stand *super antiquas vias*: I cannot legislate, but by my industry I can discover what

our predecessors have done, and I will servilely tread in their footsteps. I am therefore clearly of opinion, on principles of law, that the plaintiffs cannot recover in this action, and that we cannot in this case assume the jurisdiction of a court of equity, in order to overrule the rigid rules of law.

Ashhurst, J.—It was competent to Van Dyck and Co. to have made themselves parties to the record, instead of which, they have chosen to sue in the names of Bauerman and Co., by which they have made the latter the real plaintiffs in a court of law, and are bound by their acts and by the acts of other persons done by the orders of Bauerman and Co. Here it is admitted that if the letter in question were to be read as against Bauerman and Co., considering them as the plaintiffs, it afforded sufficient ground to convince a jury that the plaintiffs ought not to recover: but it is argued that, though the letter be admissible in evidence, as it appears by the latter part of it that Bauerman and Co. were acting only as agents for Van Dyck and Co., the admission made by the former ought not to prejudice the latter. But that argument cannot be supported. When A. appoints B. his agent, he is bound by every act and order of his, done within the scope of his authority. Here it appears by the letter, that Bauerman and Co. were present when the ship was loading, and approving of the mode in which it was effected: then if the loss happened in consequence of the directions given by Bauerman and Co., Van Dyck and Co. must be bound by it as much as if the orders had been given by themselves.

Grose, J.—Van Dyck and Co. might either have sued in their own names as the consignees, or in the names of the present plaintiffs, the consignors of the goods. They have chosen to bring the action in the names of the latter, whom therefore we must consider as the plaintiffs in the cause. As long as Bauerman and Co. are plaintiffs on the record, they must be taken to be so in all the consequences. Here it appeared by their own acknowledgment that there was no foundation for the action, and that acknowledgment must in this action conclude Van Dyck and Co.

Lawrence, J.—The ground, on which it must be contended that the admission made by a mere trustee is not evidence, is, that he has no interest in the subject, and may therefore be induced to admit what is not true. But in this

case, Van Dyck and Co. are in this difficulty ; the present plaintiffs either have or have not an interest : but it must be considered that they have an interest in order to support the action, and if they have, an admission made by them that they have no cause of action, is admissible evidence. I have looked into the books to see if I could find any case in which it was holden that the admission of a plaintiff on the record was not evidence, but have found none. There is a case in Salkeld (*a*), where Lord *Holt* said that if the plaintiff in ejectment, who is considered only as a trustee for the lessor, released the action, he might be committed for a contempt of the court, but he did not say that the release would not defeat the action ; this therefore appears to be the most that a court of law can do in cases of this kind (*b*).

Rule discharged (*c*).

(*a*) *Vide* Anonymous, 260. See, as to releases by nominal & Co. plaintiffs, *Barker* v. *Richardson*, 1 Y. & J., 362 ; *Arton* v. *Booth*, 4 Moore, 192 ; *Jones* v. *Herbert*, 7 Taunt., 421 ; *Manning* v. *Cox*, 7 Moore, 617 ; *Mountstephen* v. *Brooke*, 1 Chitt. 390 ; *Innell* v. *Newman*, 4 B. & A., 319 ; *Herbert* v. *Piggott*, 2 C. & M., 384, 2 Dowl., 392.

That the plaintiff upon the record cannot, in a court of law, be looked upon as a mere cipher, so that the party really suing shall not be bound by his acts and admissions, is further exemplified by *Gibson* v. *Winter*, 1 B. & Adol. 101, where numerous other cases are collected. One of the strongest instances is that afforded by the construction put upon the seventeenth section of the Statute of Frauds, which requires, that a contract for the sale of goods should be signed by the party to be charged, or his agent, lawfully authorised. It is held on this enactment,

(*b*) See *Payne* v. *Rogers*, Dougl. 407, where the tenant, a nominal plaintiff, having given a release to the defendant, the court ordered it to be given up on an application by the landlord.

(*c*) *Craib and Wife* v. *D'Aeth, Bart.*, Tr., 30 Geo. 3.—Debt on a bond, dated 10th June, 1776, from the defendant to M. Bartlett, spinster, now the wife of the plaintiff, W. Craib, in 300*l.* Plea, *non est factum*, and issue thereon. Afterwards there was plea *puis darrein continuance* of a release of the action, dated 30th January, 1788. The replication stated the condition of the bond, which was for the quarterly payment of an annuity of 50*l.*, and that after the making of the bond, and the intermarriage of the plaintiffs, but before the release, *viz.*, 30th October, 1784, by indenture, the plaintiffs, in consideration of 300*l.*, assigned the annuity and bond to J. Mawley, and empowered him to sue for it in their names ; and the plaintiffs covenanted not to receive or release it without Mawley's consent, or a rule, or decree, in a court of law or equity. That after the making of the said indenture, and before the release, *viz.*, 9th June, 1785, Mawley, in consideration of 320*l.*, assigned to Thomas Johnson ; that the defendant afterwards had notice of the said indentures ; that after the making of the said last-mentioned indenture, and before the release, and the plaintiff's original writ, *viz.*, Michaelmas, 1787, 112*l.* 10*s.* became in arrear, which the defendant refused to pay ; whereupon Johnson, in the plaintiffs' names, sued him for his (Johnson's) benefit ; that the defendant, having notice of the premises, fraudulently obtained the release, whereby the same is void. Rejoinder, that the bond was assigned to Mawley in trust for the plaintiffs, and not for his own benefit : and that Mawley, without the plaintiff's knowledge, fraudulently assigned it to Johnson, with a traverse that the defendant fraudulently obtained the release. The sur-rejoinder took issue on the traverse. And there was a verdict for the defendant on both the issues. The defendant, at the trial, gave in evidence before Lord *Loughborough*, at Guildhall, an affidavit of W. Craib, the plaintiff on the record, sworn by him after he had assigned the bond, in which were stated the facts relied on by the defendant ; on which the plaintiff's counsel tendered a bill of exceptions to the admissibility of the evidence, which came on, and was to be argued this day : but the court said it was too clear to be argued ; and that there could be no question, but that anything said or sworn by the plaintiffs on the record, must be evidence for the defendant.

that one contracting party cannot sign as agent for the other, *Wright* v. *Dannah*, 2 Campb. 203; and further, that if an auctioneer, who has signed for the party sought to be charged, be made the nominal plaintiff in an action against him, his signature, though it would clearly have been sufficient to bind the defendant, had the action been brought in the name of the other contracting party, will not be sufficient for that purpose, in an action in which he alleges, on the record, that the contract was made with himself. *Farebrother* v. *Simmons*, 5 B. & A. 333. This decision has been somewhat regretted; see *Bird* v. *Boulter*, 4 B. & Ad. 443.

The cases of *Bottomley* v. *Brook*, and *Rudge* v. *Birch*, on which reliance was placed in the principal case, as favouring the recognition of equitable rights in courts of law, having been disapproved of in *Wake* v. *Tinkler*, 16 East, 36, may, perhaps, be considered virtually overruled by *Tucker* v. *Tucker*, 4 B. & Adol. 745.

There are, however, many cases in which, notwithstanding the distinction between law and equity so strongly marked out by Lord *Kenyon* in the principal case, a court of law is forced to proceed upon, and recognise, the rules of courts of equity. Thus, if an action be brought by a vendee for the deposit, the court may be obliged to inquire, whether the vendor's title would be good *in equity*. *Maberly* v. *Robins*, 5 Taunt. 625; see *Curling* v. *Shuttleworth*, 6 Bingh. 121; and *Boyman* v. *Gutch*, 7 Bingh. 379. In *Morley* v. *Frear*, 6 Bingh. 547, it became necessary to reply the assignment of a bond, and the court recognised the validity of the transaction. In questions on the bankruptcy laws, it frequently becomes necessary to take equitable as well as legal rights into consideration. See *Hunt* v. *Mortimer*, 10 B. & C. 44; and though from the principal case it appears, that the admission of a person in whose name the action is brought will be evidence admissible in favour of the opposite party, yet it is well known, that the admission of the party really interested is also evidence. See *R.* v. *Hardwicke*, 11 East, 578; *Hanson* v. *Parker*, 1 Wils. 257; *Smith* v. *Lyon*, 3 Campb. 465; *Bell* v. *Ansley*, 16 East, 143; *Harrison* v. *Vallance*, 1 Bingh. 45; *Robson* v. *Andrade*, 1 Stark. 372.

MARRIOT *v.* HAMPTON.

EASTER.—37 *GEO.* 3, *K. B.*

[REPORTED 7 T. R. 269.]

Where money has been paid by the plaintiff to the defendant under the compulsion of legal process, which is afterwards discovered not to have been due, the plaintiff cannot recover it back in an action for money had and received.

THE defendant formerly brought an action against the present plaintiff for goods sold, for which the plaintiff had before paid and obtained the defendant's receipt; but not being able to find the receipt at that time, and having no other proof of the payment, he could not defend the action, but was obliged to submit and pay the money again, and he gave a cognovit for the costs. The plaintiff afterwards found the receipt, and brought this action for money had and received in order to recover back the amount of the sum so wrongfully enforced in payment. But Lord *Kenyon* was of opinion, at the trial, that after the money had been paid under legal process it could not be recovered back again, however unconscientiously retained by the defendant, though the case of *Moses* v. *Macfarlane*, 2 Burr. 1009, was referred to; and thereupon the plaintiff was nonsuited.

Gibbs now moved to set aside the nonsuit and to grant a new trial; relying on a subsequent case of *Livesay* v. *Rider*, E. 22 G. 3, B. R. where, on a similar motion, the court held such an action maintainable. And he pressed for the opinion of the court in order that the question might be settled.

Lord *Kenyon*, C. J.—I am afraid of such a precedent. If this action could be maintained, I know not what cause of action could ever be at rest. After a recovery by process

of law, there must be an end of litigation, otherwise there would be no security for any person. I cannot, therefore, consent even to grant a rule to show cause, lest it should seem to imply a doubt. It often happens that new trials are applied for on the ground of evidence supposed to have been discovered after the trial; and they are as often refused: but this goes much further.

Ashhurst, J., of the same opinion.

Grose, J.—It would tend to encourage the greatest negligence, if we were to open a door to parties to try their causes again because they were not properly prepared the first time with their evidence. Of the general principle there can be no doubt; and though the last case cited seems to throw some ambiguity upon it, yet some of the positions there stated (*a*) are so entirely repugnant to every principle of law, that I have less difficulty in disregarding the whole authority of it.

(*a*) Which his lordship read from the note of it.

Lawrence, J.—If the case alluded to be law, it goes the length of establishing this, that every species of evidence, which was omitted by accident to be brought forward at the trial, may still be of avail in a new action to overhale the former judgment; which is too preposterous to be stated.

Rule refused.

The decision in this case is founded on the policy expressed in that well-known maxim, "*Interest reipublicæ ut sit finis litium.*" And in order to prevent the confusion which would inevitably arise from allowing either well-considered transactions between parties, who had a sufficient opportunity of inquiring before they acted, or solemn decisions of courts of justice, to be wantonly opened and re-discussed, to the accumulation of expense and litigation, the law, though for a time unsettled by the decision in *Moses* v. *Macfarlane*, 2 Burr. 1009, recognises two general rules, which are thus expressed by Mr. Justice *Patteson*, delivering judgment in *The Duke de Cadaval* v. *Collins*:—"I admit," said his lordship, "in general, that *money paid under compulsion of law cannot be recovered back as money had and received;* and further, *where there are bona fides, and money is paid with full knowledge of the facts, though there be no debt, still it cannot be recovered back.*"

Under the former branch of the above proposition falls the case reported in the text; under it also falls the case of *Brown* v. *M'Kinally*, 1 Esp. 279. In that case, M'Kinally had agreed with Brown to sell him all his old iron (except bushel iron, which was of an inferior quality) at 9*l.* per ton. The iron he delivered was mixed with bushel iron; he nevertheless insisted on the 9*l.*, and brought an action for it. M'Kinally paid the demand, saying, at the same time, he did so without prejudice, and meant to bring an action to recover back the overplus; the present action was brought for that purpose. Lord *Kenyon* said the action could not be maintained.

"That to allow it, would be to try every question twice; for, that the same legal ground which would entitle the plaintiff to recover in the present action, would have been a good defence to the action brought against him by the present defendant. That money paid by mistake was recoverable by assumpsit; but here it was paid voluntarily, and so could not be recovered under the circumstances of the case."

In *Hamlet* v. *Richardson*, 9 Bingh. 644, the same principle was acted upon. That was an action for money had and received, to recover cash paid in the course of some transactions arising out of a charter-party, and, as the plaintiff alleged, in mistake. It appeared, however, that the payment had been made after letters, explicitly calling the plaintiff's attention to the subject, had been received by him, and after a writ had actually been issued against him, and an appearance had been entered to it. The jury found a verdict for the plaintiff, and also (which renders this a very strong case) that the payment had been made without knowledge, or reasonable means of knowledge, of the facts on which the demand had proceeded. The court, however, set aside the verdict. "We think," said the Lord *Chief Justice*, "this money was paid under compulsion of legal process. In *Marriott* v. *Hampton* it did not appear to what precise point the action had been carried before the money was paid; though, from the circumstance of a cognovit having been given for the costs, it is probable a declaration had been delivered. But the judgment of the court is expressed in very general terms, namely, "that after a recovery by process of law, there must be an end of litigation." In *Brown* v. *M'Kinally*, the payment made by the plaintiff in the former action, which had been brought against him by the defendant, was a payment made after action brought, but in what stage of the action does not appear. Lord *Kenyon* held the action not maintainable, for that to allow it would be to try every question twice. In *Milnes* v. *Duncan*, 6 B. & C. 679, Mr. Justice *Holroyd* says, "if the money had been paid *after proceedings actually commenced*, I should have been of opinion that, inasmuch as there was no fraud in the defendant, it could not be recovered back. . . . . We think the rule of law was accurately laid down by Mr. Justice *Holroyd*, and that as the money was paid, in this case, after the suing out of process to recover it, the defendants in the former action knowing the cause for which the writ was sued out before they paid the money, and there being no fraud in the plaintiff in this action, it appears to us that no action is maintainable to recover it back." See further, *Kist* v. *Atkinson*, 2 Campb. 63; *Gower* v. *Popkin*, 2 Stark. 8; *Knibbs* v. *Hall*, 1 Esp. 84. One of the points in *Fisher* v. *Samuda*, 1 Campb. 190, the facts of which are stated in the note to *Cutter* v. *Powell*, *ante* p. 16, proceeded on the same principle. The case of *Moses* v. *Macfarlane*, which is said at the commencement of this note to have unsettled, for the time, the law on this subject, is reported 2 Burr. 1009. There, Macfarlane sued Moses in the court of conscience, and recovered against him as indorser of a bill, in breach of a written agreement between them; Moses paid the money, and brought an action for money had and received, in the King's Bench, to recover it back, which was held to be maintainable. Although the decision itself has been overruled, the judgment of Lord *Mansfield* contains so elegantly worded a description of the action for money had and received, that it would be scarce pardonable to dismiss the case in which it appears, without extracting it. "This kind of equitable action," said his lordship, "to recover back money which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, *ex æquo et bono*, the defendant ought to refund. It does not lie for money paid by the plaintiff which is claimed of him as payable in point of honour and honesty, although it could not have been recovered from him in any course of law, as in payment of a debt barred by the Statute of Limitations, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or for money fairly lost at play; because, in all these cases, the defendant may retain it with a safe conscience, though, by positive law, he was barred from recovering; but it lies for money paid

by mistake, or upon a consideration which happens to fail, or for money got through imposition, or extortion, or oppression, or an undue advantage taken of the party's situation contrary to laws made for the protection of persons under those circumstances."

The application, however, of the above doctrine to the state of facts in *Moses* v. *Macfarlane*, has frequently been held incorrect; that case was denied to be law by *Eyre*, C. J., in *Phillips* v. *Hunter*, 2 H. Bl. 414; by *Heath*, J., in *Brisbane* v. *Dacres*, 5 Taunt. 160, and cannot be now considered as of authority. Equally, or almost equally, obvious to censure, is the case of *Cobden* v. *Kendrick*, 4 T. R. 432 (the point here spoken of being reported in the note). There an action was brought against Cobden by Kendrick for a groundless demand, which Cobden paid under a compromise, and brought an action to recover it back; it was objected that this was to litigate the same claim twice, but Lord *Kenyon* overruled the objection, saying, that it was not paid under the judgment of a court. This case, however, the Lord *C. J.* remarks, in *Hamlet* v. *Richardson*, 9 Bingh. 647, if it can be supported at all, can only be so on the ground of fraud in the defendant.

For it must be observed, that even since the decisions which have overruled *Moses* v. *Macfarlane*, it has been held open to a defendant who has paid money *under compulsion of law* imposed upon him by the fraudulent practices of the plaintiff, to maintain an action to recover back again the money so paid; not, indeed, that any case has gone so far as to permit proceedings to be thus questioned, which have advanced to the maturity of a judgment; though frequently even a judgment, particularly if signed by virtue of a warrant of attorney, or cognovit, (which are the subjects of a peculiar branch of the equitable jurisdiction of the courts,) has, when fraudulently and improperly obtained, been set aside *on motion*. But where, under the terror of inceptive legal proceedings, fraudulently directed against him, money has been paid, the party paying has been permitted to recover it *in an action*. An instance of this is presented by the late case of *The Duke de Cadaval* v. *Collins*, 4 Ad. & Ell. 858, in which Don Nuno Alvares Pereira de Mello, Duke de Cadaval, was arrested by one Thomas Collins, an insolvent, for a fictitious debt of 10,000*l.* upon a writ which was afterwards set aside. The duke, who was ignorant of the English language, in order to obtain his release, agreed, in writing, to pay 500*l.*, and to give bail for the remainder of the sum; and the 500*l.* was accordingly paid. An action having been brought by the duke to recover it back, the jury found for the plaintiff, and that the defendant Collins knew that he had no claim upon the plaintiff. And the court afterwards discharged a rule for a new trial, or to enter a nonsuit. "It is asserted," said Lord *Denman*, "that the principle of decision in *Marriot* v. *Hampton* has not been adhered to in this case. But that case does not warrant the argument drawn from it. It does not decide that money obtained under compulsion of legal process cannot be recovered back; but only that, after the defence in an action has failed, and money has been recovered in the action, it cannot be recovered back in another action. This is the ground upon which the decision is put by Lord *Kenyon*. He says, 'After a recovery by process of law—not extortion—there must be an end of litigation.' It will be observed also, in *Hamlet* v. *Richardson*, that Lord C. J. *Tindal* hints, that *Cobden* v. *Kendrick* might be, perhaps, supported on the ground of *fraud*. Analogous, in some degree, to the case of *Duke de Cadaval* v. *Collins*, is that of *Pitt* v. *Combes*, 2 Ad. & Ell. 459, which came before the court by way of motion. Pitt had been arrested while privileged as in attendance on the court, and had, in order to obtain his liberty, paid into court, under a judge's order, the amount for which he was sued. The court ordered it to be restored to him. "The arrest," said Lord *Denman*, C. J., "was, we think, illegal. The consequence is, that the money was improperly extorted. In saying so, I do not mean to suggest that the proceeding was corrupt; but the money, having been the price paid to recover liberty improperly taken away, must be restored." See *Jendwine* v. *Slade*, 2 Esp. 573. In *Brisbane* v. *Dacres*, 5

Taunt. 156, we find *Gibbs*, J., saying that he was counsel in *Chatfield* v. *Paxton*, and that he then, and still, acceded to the doctrine, that money paid with knowledge both of law and fact, but under fear of an arrest, would be recoverable.

The second branch of the proposition cited at the commencement of this note, from the judgment of Mr. J. *Patteson*, was, it will be remembered, as follows :— *Where there is bona fides, and money is paid with full knowledge of the facts, though there be no debt, still it cannot be recovered back.* This is in accordance with the maxim of the civil law, which is also that of our own, *ignorantia juris excusat neminem, ignorantia facti excusat.* Thus in the case of *Bilbie* v. *Lumley*, 2 East, 469, an underwriter, having paid the loss, sought to recover it back on the ground that a material letter had been concealed. But, as it appeared he knew of this at the time of the adjustment, held, he could not recover. Lord *Ellenborough* asked the plaintiff's counsel, " whether he could state any case, where, if a party paid money to another voluntarily with full knowledge of the facts of the case, he could recover it back again, on account of his ignorance of the law?" No answer being given, his lordship said, that *Chatfield* v. *Paxton* was the only case he ever heard of, where Lord *Kenyon*, at *Nisi Prius*, intimated something of that sort. But when it was afterwards brought before the court, other circumstances were relied on, and it was so doubtful on what ground it turned, that it was not reported. " Every man," his lordship observed, " must be taken to be cognizant of the law, otherwise there is no saying to what extent the excuse of ignorance may not be carried. It would be urged in almost every case." In *Lowry* v. *Bordieu*, Dougl. 467, money paid under a mistake of law was endeavoured to be recovered back again. And there *Buller*, J., said, " *Ignorantia juris non excusat*," &c. With regard to the case of *Chatfield* v. *Paxton*, mentioned by Lord *Ellenborough*, a very full account of it, in its different stages, will be found in the judgment of *Gibbs*, J., who was of counsel in it, in *Brisbane* v. *Dacres*, 5 Taunt. 155. The above case of *Bilbie* v. *Lumley*, is recognised in *Lothian* v. *Henderson*, 3 B. & P. 420, and *Gomery* v. *Bond*, 3 M. & S. 378. There the defendant agreed for the purchase of some seed, but on its being brought to him, would not accept it, on which the plaintiff requested him to try to sell it for him, which he tried to do ; but failing, brought it back again : the plaintiff refused to receive it, and brought this action for the price. The judge submitted to the jury—1. Whether there was an agreement for sale.—2. Whether the plaintiff had waived it.—3. Whether he had done so in ignorance of his rights ; telling them, " that if he did it under an ignorance of the law, and impression that his remedy was gone, it would not amount to a waiver of the benefit of the agreement." The jury having found for the plaintiff, a rule for a new trial was obtained on the authority of *Bilbie* v. *Lumley*, and was afterwards made absolute. In *Skyring* v. *Greenwood*, 4 B. & C. 281, the principle established by *Bilbie* v. *Lumley* was carried further, and it was held, that an allowance in account is equivalent, for this purpose, to the payment of money. In that case, Messrs. Greenwood and Cox, the celebrated army agents, had given credit to Major Skyring in certain sums of 1*s.* 1*d.* and 2*s.* *per diem*, in a running account between him and themselves. They had delivered him a statement of account in 1821, showing a balance of 116*l.* 9*s.* 7*d.* in his favour. It afterwards, however, turned out, that the sums of 1*s.* 1*d.* and 2*s.* *per diem*, were not payable to officers in Major Skyring's situation, and that Greenwood and Cox had received an intimation to that effect in December 1816, from the Ordnance-office, which, however, they did not communicate to Major Skyring, otherwise than by ceasing to credit him in account with the 1*s.* 1*d.* *per diem* after the end of 1817, and by writing him a letter in 1821, requiring repayment of the 1*s.* 1*d.* and 2*s.* payments. In an action by the administratrix of the major, for the balance due at the time of his death, they were not permitted to retain the sums with which they had by mistake credited him. " Suppose," said *Bayley*, J., " that the balance of the account delivered in 1821 had been paid to Major Skyring,

and that no subsequent pay had been received for his use by the defendants; and they had brought an action to recover back the money paid. It would have been a good defence to that action to say, that the defendants had voluntarily advanced money to the deceased when he asked no credit; and that they had received the money for his use; and that on the faith of their representation he had drawn it out of their hands, as his own money, and had been induced to spend it as such. (See, in accordance with this view, *Shaw* v. *Picton*, 4 B. & C. 715.) And if they could not recover the money back, neither ought they to be allowed to retain other monies belonging to the deceased, on the ground that they have paid or allowed him in account money which they had not in fact received to his use, but which they had suffered him to consider his own for a long period of time."

A similar point was decided in *Bramston* v. *Robins*, 4 Bingh. 11. There, a landlord, from 1807 till 1822, allowed his tenant larger sums than were really payable on account of land-tax, and gave receipts on that footing. The tenant assigned his tenancy, and the landlord, discovering his mistake, distrained the assignee for the arrears. It was held he had no right to do so. "It is an established principle," said *Best*, C. J., "that if money be paid, (*and a settlement on account is the same thing*,) with a full knowledge of the circumstances at the time of the payment, it cannot be recovered by the payer."

In *Bramston* v. *Robins*, the court relied upon the judgment in *Brisbane* v. *Dacres*, 5 Taunt. 143, which is a celebrated case upon this subject. In that case, the captain of a king's ship had brought home treasure for the public in the performance of his duty, and treasure for individuals for his own emolument. He received freight for both, and paid one third of it, according to a usage formerly established in the navy, to the admiral commanding him. He afterwards discovered that he was not bound by law to pay any part to the admiral, and thereupon he brought this action to recover back the above payment. The court held, that he had acted illegally in conveying home the private treasure for his own benefit without the orders of some competent authority, and could therefore found no claim on such a transaction. And that, with regard to the public treasure, the third having been paid over to the admiral, with full knowledge of the facts, could not now be recovered, since the admiral, having received it in accordance with the usage of the profession, might conscientiously retain it. *Heath*, J., said this was a stronger case than *Marriot* v. *Hampton*; "for that was *judicium redditum in invitum*, whereas here the plaintiff is judge in his own cause, and decides against himself, and he cannot be heard to repeal his own judgment. Lord *Eldon*, Chancellor, in 7 Ves. 23, *Bromley* v. *Holland*, approves Lord *Kenyon's* doctrine, and calls it a sound principle, that a payment voluntarily made is not to be recovered back."

But though a payment made with knowledge of the facts cannot be recovered back because made in ignorance of law, it is different where the payment was made under a mistake of facts. In *Milnes* v. *Duncan*, 6 B. & C. 671, the plaintiff, who was employed by the defendant to collect his rents, having received more than 150*l.*, sent to him on account thereof a bill, dated at "*Glen Anne Mills*, Nov. 24, 1825," on a gentleman at Liverpool, and which had several indorsements, but bore nothing on the face of it which showed it to have been drawn or indorsed in Ireland. The bill was dishonoured, and the defendant overheld it so long as to discharge all the previous parties; he nevertheless called on the plaintiff to remit the 150*l.* rent for which the bill was sent, alleging that it was a nullity, being impressed with a four-shilling stamp. The plaintiff directed his agent to examine it, and, being satisfied that it really bore a four-shilling stamp, paid the amount of it to the defendant. Afterwards it was discovered that the bill had been drawn in Ireland, and bore the stamp appropriated to a bill of that amount by the Stamp Act of that part of the kingdom, on which he brought this action to recover back the amount.

The court held that he was entitled to recover. "There is no doubt," said Mr.

Justice *Bayley*, "as to the rule of law applicable to this case. If a party pay money *under a mistake of the law*, he cannot recover it back. But if he pay money *under a mistake of the real facts*, and no laches are imputable to him in respect of his omitting to avail himself of the means of knowledge within his power, he may recover back such money. . . . It seems to me that the plaintiff, at the time when he made the payment, had no adequate means of knowing that the bill was not a void bill; that being evident, it is quite clear that the money was paid under a mistake of facts, and without any laches on the part of the plaintiff, and for these reasons, I think he is entitled to recover it back." In *Chatfield* v. *Paxton*, 2 East, 471, *note*, Mr. J. *Ashhurst* says, that "where a payment has been made, not with full knowledge of the facts, but only *under a blind suspicion of the case*, and it is found to have been paid unjustly, the party paying may recover it back again." The recent case of *Lucas* v. *Worswick*, 1 Moo. & Rob. 293, in the Common Pleas of Lancaster, has advanced this doctrine still further. In that case the defendant, having a claim for work and labour against the plaintiff, amounting, as he insisted, to 142*l.* 7*s.* 6*d.*, but, as they insisted, to 97*l.* 7*s.* 6*d.* only, requested 20*l.* 10*s.* on account, which was paid him. He afterwards met Mr. Lucas, one of the plaintiffs, the same from whom he had received the 20*l.* 10*s.*, and agreed to give up the disputed item, on which Mr. Lucas paid him 97*l.* 7*s.* 6*d.*, but almost immediately after sent him notice that he had forgotten, when he did so, that he had previously paid him 20*l.* 10*s.*, which he therefore requested him to return, and, on his refusal, brought an action for it. *Pollock*, for the defendant, submitted, that the money having been paid by Lucas voluntarily, and with knowledge of all the facts, could not be recovered. The point was reserved, and the plaintiff had a verdict subject to it. The case was afterwards fully discussed before Lord *Denman* and Baron *Bolland*, who were of opinion "that as the jury had in effect found that the money was paid by mistake in the hurry of business, they were of opinion that it might be recovered back as money had and received to the use of the plaintiffs:" and they discharged the rule *Nisi*, which had been obtained for a nonsuit. The *dicta* in this case certainly go far. The money paid by Lucas to the defendant could not have been paid under any mistake of law, and therefore if paid by mistake at all, it must have been under a mistake of fact. But whether it be consistent with sound policy to allow a person who has had the very fullest means of knowing all the facts to allege that he was hurried, and that he has forgotten them, appears extremely questionable. The truth or untruth of such an excuse may be the subject of probable guess to others, but can be *known* only to the party making it, and its admission seems to afford great facilities to parties wishing to rip up and litigate transactions which have turned out less advantageous to them than they once expected. Can it be said that such a person has been guilty of no laches? a question which in *Milne* v. *Duncan* was considered material. Nor does it seem absolutely necessary to establish such a doctrine in order to support *Lucas* v. *Worswick*, for it seems obvious that the conduct of the defendant was tinctured with fraud, and if so, he could, of course, not be permitted to retain monies entrapped by circumvention and dishonesty. In *Brisbane* v. *Dacres*, it was thrown out, that money paid with full knowledge of the facts, might be recoverable if it were *contra æquum et bonum* that the defendant should retain it. And on this reason, it is apprehended, rests the case of *Dew* v. *Parsons*, 2 B. & A. 562, which was an action brought by Mr. Dew, Sheriff of Herefordshire, against one Parsons an attorney, for the sum of four shillings and a penny, against which the defendant claimed to set off ten and sixpence, which his clerk had paid to the plaintiff on the issuing of three warrants under one writ, against three defendants; the clerk paid it on its being claimed by the plaintiff as a right; but, on mentioning it to the defendant, he disapproved of it, and said it was an imposition. The learned Judge, Mr. J. *Holroyd*, held, that the plaintiff had a right to four-pence only for each warrant; and he was consequently nonsuited. On a motion for a new trial, it was urged that the money had been paid with full

knowledge of the facts, and could, therefore, not be recovered. On the other hand it was contended that the money had been wrongfully exacted under a claim of right, and that it was against good conscience that the plaintiff should retain it. The rule was discharged. In *Brisbane* v. *Dacres, Gibbs,* J., mentions that extortion was one of those cases in which money paid might be recovered back; and, indeed, the distinction is plain to common sense, between the case of money paid upon a claim made by a public officer, who is judge in his own cause, and has the power of withholding, by his own mere motion, the ordinary rights of a subject from the adverse party till his demand is complied with, and money paid under a claim made by a private individual, who has no power of enforcing it, except by adopting the ordinary legal remedies. In the former case, it is obviously *contra æquum et bonum* that the public officer should retain what he has thus acquired by taking an undue advantage of his situation; in the latter case, the claimant may have been impressed with a fair belief of his own right, and (if the party making the payment was not deceived) then his retainer of the money when paid, is no more *contra æquum,* than his claim of it in the first instance. These considerations render it somewhat difficult to reconcile with sound principle the case of *Bize* v. *Dickason,* 1 T. R., 285, where there were mutual debts between two persons, and one of them becoming bankrupt, the other, instead of setting off his own claim, as he might have done, paid the assignees in full; and it was held, that he might recover an amount corresponding to that which he had neglected to set off in an action for money had and received against the assignees. On this case, *Gibbs,* J., observes, in *Brisbane* v. *Dacres,* that the only question raised in it, was, whether the plaintiff would have had a right to deduct the sum he sued for; and it is certainly hard to reconcile it with *Bilbie* v. *Lumley.* It has, however, frequently been treated as a case of money received against conscience, *ex. gr.* in the same report of *Brisbane* v. *Dacres,* p. 162, *Mansfield,* C. J., says, "In *Bize* v. *Dickason,* the money ought, conscientiously, to have been repaid."

Upon the whole, then, it is clear—

1. That money obtained by compulsion of law, *bonâ fide,* and without taking an undue advantage of the situation of the party paying it, is not recoverable.

2. That money paid with full knowledge of the facts is not recoverable, if there be nothing unconscientious in the retainer of it.

3. That money paid in ignorance of the facts is recoverable, provided there have been no laches in the party paying it.

The application of these rules will be seen in the decisions brought together in the above note.

MANBY AND ANOTHER *v.* SCOTT.

K. B., MICH.—12 *CAR.* 2.

[REPORTED 1 LEVINZ 4.]

Whether the wife's contract shall bind the husband, or not.

IN *assumpsit*, on issue *non-assumpsit*, a special verdict at Guildhall, before *Mallet*, Justice, found, that Scott's wife departed from him without his consent, and lived twelve years separate from him, and then returned; but he then would not receive her, nor allow her any maintenance, and discharged or forbade tradesmen, particularly the plaintiffs, from trusting her with any wares: and that the plaintiffs, being mercers, sold to the wife wares to the value of 40*l.*, and that the prices were reasonable, and the things fit for her quality; and if the husband was obliged to pay for them, they found for the plaintiff, and if not, for the defendant.

This case was argued at the bar three several terms, first by *Alleyn*, for the plaintiff, and *Wylde*, for the defendant; secondly, by *Finch*, for the plaintiff, and Sergeant *Beare*, for the defendant; and thirdly, by *Jones*, for the plaintiff, and Sergeant *Baldwin*, for the defendant, and afterwards by all the judges at the bench, viz. *Foster*, Chief Justice, *Mallet*, *Twysden*, and *Wyndham*: and the whole court agreed, that the verdict was sufficient, though it did not find what the goods were; for although what are fit and necessary is to be tried by the court, yet it is that court by which the case is tried, and not the court here before which it comes to be adjudged on the special verdict: and that these goods were fit for her quality is agreed by both the jury and the court where the cause was tried. But whether the husband should be charged, the court was divided in opinion; *Twysden* and *Mallet* held that he should be

charged; for, when she returned to her husband, and he would not receive her, nor provide a maintenance for her, if nobody would trust her so as to charge the husband, she must starve, for she cannot earn her living by her labour, for whatever she gains by her labour the husband shall have; and therefore of necessity she must be trusted, and the things being necessary for her living, the husband ought to be charged for them; and the husband's prohibiting the plaintiffs to trust her, cannot deprive her of the liberty which the law gives her for preservation of her life; for the law of necessity dispenses with things which otherwise are not lawful to be done, as to throw down my neighbour's house for preventing the spreading of fire, to throw goods out of a boat when it is overladen, and the like; and they agreed the case put by *Fineux*, 21 H. 7, 40, that the wife cannot provide bread for the family so as to charge the husband: but here the provision is necessary for the maintenance of her own life; and though alimony be recoverable in the spiritual court, yet if the husband be obstinate, and will not obey their sentence, how shall the woman live? And if he will obey it, yet how shall she live in the mean time? And as to the cases cited at the bar of writs to the sheriff, for delivering to the wife reasonable estovers, those were in time of H. 3, and have been long time disused. And *Twysden*, Justice, held, that in this case the plaintiffs might have trover against the husband for the goods, if the contract be void, which all the others denied; the goods being delivered by the plaintiff and he not to re-have them: and the said two judges held, that as the husband shall be bound in trespass for a trespass done by the wife, or in trover for goods taken by the wife, so he shall be here for goods sold to her for relief of her necessity; and to maintain the opinion for the plaintiffs, were cited 20 H. 6, 26, Dyer 234; 11 H. 6, 30. Also 10 Co. *Bishop of Salisbury's Case*, that a bishop may grant an office of necessity notwithstanding the statute. And 9 Co. 73. A feme covert excused in a ravishment of ward for necessity, because she has nothing to pay; and it is no disadvantage to the husband, for he is charged only for necessaries, and those he must have provided if the wife had continued with him, and divers other matters were said, and divers other authorities cited on this side.

But of the contrary opinion were *Foster* and *Wyndham*, and on this part it was argued, that the husband shall not be charged; for when she departs from her husband against his will, and remains so long absent, and returns again at her own pleasure, the husband shall not be obliged to maintain her after her return, any more than when she was absent; for if it were so, wives might leave their husbands in their youth, and return in their old age, when they cannot be so assisting to their husbands as before; and their society, assistance, and comfort, to their husbands, is one consideration of their maintenance: a feme covert cannot make any contract to charge her husband without his assent, precedent or subsequent, expressed or implied; they did not deny, but that, as circumstances may be, an express or implied assent of the husband may appear to a jury, so that the contract of the wife may be the contract of the husband; as if the goods come to his house, or he appears well content with the use of them; but here the contrary appears, for the plaintiffs were forbid by him to sell to or trust his wife, and it does not appear that he ever had knowledge of this sale, and so could not approve thereof; and the jury having found only the forbidding and the sale, the court is obliged to adjudge, according to the law, that the contract is void, for a feme covert has not power of herself to make any contract: and it is not like to the case of infants, for their contracts are to some intents good, and may be made good by them at their age; but the contracts of feme coverts are absolutely void, for they have not any power or will, but are subject to the will of their husbands; every man may trade with what tradesmen he will, exclusive of all others; but by this means they shall be forced against their will to trade with such as their wives please. And the laws of England have provided for wives more reasonably than to make them their own carvers (*viz.*) to go to the ordinary for alimony, the costs of which suit the husband shall pay, if the wife hath just cause of complaint, 1 Cro. *Green's Case*, and to supply it in case of the husband's obstinacy, 8 H. 3, *Rot. Claus. Memb.* 19. vel 39, *Fretchinfield's Case*, and 4 H. 3, *Rot. Claus. Memb.* 3, where the husband was obstinate, writs *de estov. habend.* were directed to the sheriff to levy estovers (*i. e.* maintenance) for the wife, of the husband's goods, which

cases, though ancient, are still law, although the law has now provided another remedy against the obstinacy of the husband, by *excom. capiendo.* And in maintenance of the opinions on this side, were cited 21 H. 7, 40, that she cannot charge her husband for victuals bought for the family without his command precedent, or assent subsequent. F. N. B. 120, G., the contract of the wife shall not charge her husband any more than the contract of the servant. 4 Co. *Forse* and *Hemling's Case*, she can neither make a will, nor revoke a will made before marriage, because she has no will, and therefore the marriage is a revocation, for else the will would be irrevocable. 2 Cro. 640, *Tracy* v. *Dutton*, her receipt after marriage, of the rent of her own land, shall be no discharge against the husband, although the tenant had no notice of the marriage, 31 E. 1, Tit. Debt, 663, and 3; 20 H. 6, 22; 27 H. 8, 24, 25; 13 R. 2, Tit. Annuity, 50. And those judges held the prohibition by the husband to be material.

But the court being thus divided, the cause, for the great weight thereof, was adjourned into the Exchequer; and there, after divers arguments at the bar, it was solemnly argued by all the judges severally at several days at the bench, where *Tyrrell,* Justice, of Com. Banc., joined in opinion with *Twysden* and *Mallet;* all the rest, *viz. Bridgman*, Chief Justice, of Com. Banc., *Hale*, Chief Baron, of the Exchequer, *Hide* and *Brown*, Justices, of Com. Banc., and *Atkyns* and *Turner*, Barons of the Exchequer, and *Foster*, Chief Justice, and *Wadham Wyndham*, Justice, of the King's Bench, agreed, that the husband should not be charged, but that judgment ought to be given for the defendant: and so it afterwards was on a motion in *Banco Regis*, and the judgment was there entered in Easter Term, 15 Car. 2.

MANBY *v.* SCOTT.

IN THE EXCHEQUER CHAMBER,
By Adjournment.

[REPORTED 1 SIDERFIN, 109, AND TRANSLATED FROM THE ORIGINAL FRENCH BY JOHN GEORGE PHILLIMORE, ESQ., BARRISTER-AT-LAW.]

In an action on the case in *assumpsit*, the case on a special verdict found in London, was to this effect: Dame Scott, wife of the defendant, Sir Edward Scott, left her husband against his will, and after a time she made demand of cohabitation with her husband, but he refused to receive her. And during the time she was absent from her husband he prohibited several people from supplying her with goods or wares of any kind, and if they should be supplied, declared that he would not pay for them, and, among others, he specially prohibited the plaintiff, who, nevertheless sold the said dame yards of silk and velvet to the amount of 40*l.*, (for which this action was brought,) which the jury found were necessaries suitable to the degree of her husband; and whether this be an *assumpsit*, they pray the advice of the court. This case was often argued in the King's Bench, and the opinions of the judges there were divided: *Foster*, chief justice, and *Wyndham*, puisne judge, giving their judgment for the defendant; and *Mallet* and *Twisden*, justices, giving their judgment for the plaintiff. And as the court was divided, the case was adjourned to the Exchequer Chamber, before all the judges of England; and afterwards it was argued at *the bar*, and afterwards in Michaelmas, Hilary and Easter Terms (14 & 15 C. 2, 1662, 1663) judgment was pronounced by all the justices of the K. B. and C. P., and the Barons of the Exchequer, many of whom prefaced their arguments by observing,

I. The general importance of this case: and also,

II. The dearth of authorities relating to the subject in our books.

1. As to the general importance of the case, it was observed, that in no case pleaded before in this court, were a larger portion of mankind concerned; for the judgment delivered in it concerned the two sexes—that is, so many of each as are married or will be married*. Nor could such interest be nearer or more direct, since it related to the acts of wives, who are, by the law of this country and the law of God, accounted identical with their husbands; and *Hale*, C. B., said that the case was not, in itself, of general consequence, inasmuch as it consists of its own particular circumstances, nor was it of general application, but that it would be rendered generally important, because the course of arguments had at the bar borne upon topics applicable to all husbands and all wives, for the prevention of similar actions.

II. The want of authorities on this subject in our books—the reason of which, according to some, is, the discretion of our ancestors, which was so great, that they would not publish and bequeath such matters to posterity, in order that the knowledge of their power (which would render the one cruel and the other disobedient) might be kept from wicked husbands and wicked wives—which, so long as they are kept in ignorance of it, they will not endeavour to abuse. Another reason may be, that in their times no great cruelty

* [Note by J. G. Phillimore, Esq.]—The Roman law relating to the subject discussed in the text, will be found in the Code Lib. 4, Tit. 12, and in Voet's Commentary on the Pandects, Lib. 23, Tit. 2, 44. It will not perhaps be considered impertinent in this place to observe, that women, during the early period of the Roman history, were not only excluded from all public transactions, but that their domestic activity was confined within very narrow limits. "Majores nostri nullam ne *privatam quidem rem* agere fœminas *sine auctore* voluerunt, sed in manu esse parentum fratrum virorum."—*Liv.* Hist., Lib. 34, c. 2.

Thus women could not be witnesses to a will; not, as has been said, from the presumed imbecility of the sex (though a passage in Plutarch's life of Publicola might seem to fortify such an opinion), but because they could not share in the public solemnities of its ratification. Comitiis interesse non potuerunt. The same spirit of jealousy and caution may be traced in the law which inflicted an equal punishment upon a woman who drank wine (a crime, which, as Dionysius Hal., who has preserved the Law Aut. Rom. 2—25, remarks, and as many passages in Aristophanes prove, was considered by the Greeks as eminently venial in that sex), and upon an adulteress. This severity fell, however, into disuse, and was succeeded by that looseness of conduct and disregard of restraint among the Roman ladies, with which every reader of Juvenal is familiar.

It was for the purpose of imposing some check upon the habit of mingling in all transactions, which had become inveterate among the sex, that the Senatus Consultum Velleianum was enacted, by which women were forbidden to become bound for others; ne pro ullo fœminæ intercederent.—Dig. 16, 1—7. Heineccius, Ant. Rom., Lib. 3, Tit. 21.

The French law upon this subject is stated by Monsieur Duranton, in his celebrated "Traité des Contrats," with his usual clearness and precision. It will be found vol. i., c. 2, sect. 2—4, under the head, "Incapacité des Femmes mariées," p. 233—272. "La régle que les femmes mariées ne peuvent contracter sans l'autorisation de leurs maris ou de justice, reçoit plusieurs limitations."—See also Code Napoleon, Livre 1, Titre 5, Chap. 6, p. 220. "La femme, si elle est marchande publique, peut, sans l'autorisation de son mari, s'obliger pour ce qui concerne son négoce, et au dit cas, elle oblige aussi son mari, s'il y a communauté entre eux."

prevailed, nor was there ever known among them such a case as is now before us; and therefore our ancestors did not think it necessary to guard by law against a crime which they did not suppose any would commit; *semble*, like the Athenians, who had no law against parricide, as they presumed that no man would kill his father. And afterwards judgment was given for the defendant. But as some of the judges delivered their opinions in favour of the plaintiff, I shall repeat the substance of their arguments, as by way of objection. The judges who gave their judgment for the plaintiff, were, *Mallet* and *Twisden*, of the K. B., and *Terrill*, J., in the Common Pleas; and the purport of their argument was as follows:—

I. If every law but ours obliges husbands to provide for the support of their wives.

II. If our law does, of itself, without the aid of the canon or other law, provide that husbands shall support their wives.

III. To examine the circumstances of this particular case.

I. If every law but our own imposes on a husband the duty of maintaining his wife? The laws of God, of nature, and of nations, tend greatly to promote and encourage matrimony, as the cause to which man owes the successive propagation and continuance of his race; and it never can be supposed that laws which encourage such a state, would place either of the parties to it beyond their care, or expose them to the evils arising from separation, from cold, and hunger. Holy Scripture enjoins husbands, *quod amore afficiant uxores suas.* Therefore any neglect of wives can be considered in no more favourable light than a contempt of this ordinance, which, however, it is emphatically our duty to observe,—emphatically, because, before the sanction of divine authority, it was a law of nature, written on the hearts of all men, of which the practice of all nations is sufficient testimony. And though hardly any law gives the husband so much power on marriage as our own (the civil law, for instance, did not), nevertheless all laws oblige the husband to maintain his wife.

II. If our law of itself provides that husbands shall maintain their wives without having recourse to the civil or canon law; and this subject is twofold.

Firstly. If our law provides a remedy in this case of itself.

Secondly. Admitting that it does not, what law would be supplemental to our law in such a case?

Firstly. If our law provides the remedy in itself? They hold that it does; and this they offer to prove

1. By parallel cases;
2. By reason;
3. By authorities.

From parallel cases. Matters depending in our courts are composed of an infinite number of special circumstances, and it therefore is as rare to find a precise correspondence between the facts of one case and those of another, as an exact resemblance in the face of one man to that of another. Therefore it is the wisdom of the sages of our law, by the analogy with other cases, to investigate their doubts, and thus to satisfy their judgments. Here the question is, will the contract of a wife for necessaries make her husband liable? For nobody will dispute that usually the contracts of wives are void, as all their power is transferred to the husband by their marriage. Yet, as to matters necessary "*ad sustentationem vitæ*," this power is not transferred, but, on the contrary, established and made absolute in the wife by means of the marriage. This is founded on the necessity of the thing; and our law allows many persons who are otherwise disabled, in cases of necessity to enter into contracts; as an instance, it is a general rule that the contracts of all infants are void, but, nevertheless, in cases of necessity their contracts shall bind them. And that not only "*quoad esse, sed quoad necessitatem convenientiæ*," and therefore it is, that if an infant makes a contract to give a man so much for teaching him to read and write, this will bind the infant, as was decided in *Clare and Darrel's case*, 2 Car. Ro. 527. The reason assigned is, that it is for the benefit of the realm that learning should be advanced; but more requisite is it that, as in our case, life should be preserved by reasonable sustenance. For this reason also the infant shall be bound, if he be a householder and buy necessaries for his family, as was adjudged in *Hill and Blackton's case*, Trin. 15 Jac. Ro. 1374; and what has been said of an infant is applicable to an idiot, in case of housekeeping; and if an idiot makes a contract of matrimony, this may bind him, as was adjudged in *Stiles and West's case*,

3 Jac., Roll. 1374; yet it is generally admitted that the contracts of idiots are void. Also if the master of a ship contracts for the necessary repairs thereof, this binds the owner, Hob. Rep. 11, *Bridgman's case*, although in that case the master was not obliged to repair it, yet, inasmuch as the repairs were necessary to save the ship from foundering, the law enables him to bind the defendant by his contract. By which cases it appears, that our law imposes a liability on persons in cases where the preservation of learning, the support of families, and the reparation of ships, are concerned, although without such special matter, the persons in none of these cases would be charged: then, in this case, is the husband liable, inasmuch as the preservation of his wife's existence is at stake, which ought to be of far greater value in his eyes than any of the things abovementioned.

By reasons, *i. e.* reasons deduced from our law, and which are not general. And these are—

1. As our law gives all that the wife has to her husband on marriage, if wives shall not be allowed to obtain food and other necessaries, wives will be in a worse condition than those who commit treason or felony, for felons shall be allowed from their goods reasonable estovers, to save them from starving. And the statute, *Art. Cler.**, provides that persons who abjure the nation shall have sufficient estovers of their goods. But women cannot enjoy this privilege if they can take nothing without the permission of their husbands, but they will be left to perish, Tantalus like, from thirst and hunger, amid the overflowing exuberance of their husbands' plenty.

* *Nota quod cum quis abjurai regnum habebit camiciam tunicam et braccas et totum residuum quicquid erit confiscatur Domino regi.* 407 Fitz. Gr. Abr. *corone et plees del corone, fol.* 22.

2. Our law is, that if the wife takes the goods of another and converts them to her own use, this is the trover and conversion of the husband, and so ought to be the writ; otherwise it shall abate, for a wife cannot make a conversion to her own use.

And *Twisden* said, if a wife takes corn, makes bread, and eats the bread, this is the trover and conversion of the husband. And he said, if the wife buy cloth, or stuff, for her attire, and uses them, if the purchase be void as a contract, the husband and wife shall be charged in trover and conversion for the goods. Therefore if, as they who agree

for the defendant suppose, there would be any evil in rendering the contracts of the wife binding on the husband, the mischief here would be equally great, in making the husband liable in trover and conversion.

3. Our law allows that if the wife commits trespass, the husband shall be punished on her account; and if they shall be liable for torts committed by their wives against strangers, greater reason is there that they shall be liable to actions for things which the wife took for her necessary support, the rather as this is for the encouragement of trade, as it has been always usual that wives should purchase for themselves.

4. If wives are beaten or wounded, they can bring no action on that account, but their husbands shall, and recover damages, as it is every day's experience that if they go to a surgeon to be cured of their wounds, the husband pays for them; and this is, it seems, established by *Rippon* and *Norton's Case*, 3 Cro., 849. There it was resolved, that Peter is not bound to pay for the cure of his son's wounds; and the reason assigned is, because Peter shall not recover any damages for the wounding of his son; which implies, that if he could recover damages, as the husband can, he should pay for the cure; and therefore the husband shall pay for the cure of his wife. For, although our law makes a wife subject to her husband, yet the husband may not put her to death. But this shall be murder; neither can he beat her. But the wife may swear the peace against him, 1 E. 4, 1 a.; and by a parity of reason he cannot starve her.

5. If husbands shall not be bound by the contract of their wives for necessaries, without their real assent, husbands may abandon their wives without just cause, when they desire to have others, and thus cause them to perish; and therefore it is more consonant to reason to say, that husbands shall be liable for the contracts of their wives for necessaries, on an *assumpsit* in law; or that, by marriage, a power is given to wives by the law to take all things necessary for support, by which contracts the husband shall be, during the marriage, irrevocably bound. And thus shall a security be provided for the wife against being stripped on each ungrounded suspicion, and of being starved on each wanton displeasure of her husband.

Again, if such cruelty shall be sanctioned, and wives shall not be allowed necessaries, England will lose the happy reputation in all foreign kingdoms, which her inhabitants have achieved by their respect for this sex, the most excelling in beauty, which, as in this climate it far transcends that of the women in all other lands, so has this kingdom surpassed all other countries in its tenderness and consideration for their welfare.

As to the objection, that such a case is up to this time without precedent in these courts, and therefore according to *Littleton's* argument the action cannot be maintained. It was answered, that admitting such an action to be unprecedented, it is in our power to make a precedent, if we are warranted in so doing by sufficient reason. For there was no precedent of an action on the case against the executors in *assumpsit*, on the *assumpsit* of their testators, before 12 Hen. 11, as is seen at length in *Norwood* and *Reed's Case*, Plowden, 182 a.; and if those judges were now living, yet would they have no reason to repent the delivery of that judgment, since the evil in such a case being general, it never could be too late for its redress by the authorities.

As to the case of *Sir Nicholas Poyns*, 7 Eliz., Dyer, 234, they said that it is no authority for or against them, but a case of which the report is doubtful. But the places on which they chiefly relied were 11 H. 6, 306, *Scot's Case*, where *Martin* said, if the wife buys things not suited to the degree of her husband, the husband shall not be charged for them; but if they are suited to the degree of her husband, the husband shall be charged; which, they said, was an authority in point. And they cited also 20 Hen. 6, 216, where it was said by *Markham*, and 27 Hen. 8, 25 a., where it was said by *Broke*, that if the thing comes to the use of the husband, the husband shall be charged for the contract of his wife.

And for modern authorities they cited *The City of Worcester* and *Gerrard's Case*, 7 Car., which was, that Gerrard had married a woman possessed of considerable personal estate, which woman had a grandchild. The wife died; and the question was, whether Gerrard should maintain the child (for it is not within statute), and it was agreed by *Cooke* and *Whitlock*, J., to whom the case was referred, that

Gerrard ought to maintain the grandchild, for the estate *transit cum onere*. *A fortiori*, therefore he shall be compelled to provide for his wife. And in *Bereblock* and *Nichols' Case*, 2 Cro. 258, the contract of the wife is admitted to be good in such a case, from all which it is manifest that our law of itself provides a remedy in such a case, without the aid of any other law.

Secondly. Admitting that our law provides no remedy, from what law our law shall desire assistance in such a case. It is the excellence of our law that its judges are illuminated and fortified by the concurrent justice and support of all other arts and sciences, and its honour that these great courts where it is administered are public, and interfere not with immodesty or indecent subjects, as divorces and other evils of matrimony, which are more easily allayed by private conference than healed by public discussion; therefore it is said that no ill effect can result from the decision, that at common law the contract of the wife does not bind the husband, for she has her remedy for alimony in the spiritual court. To which they answer, that true it is that if our law is assisted by any other law in this case, it is by the canon law, and the wife must sue in the spiritual court (for no other has, or pretends to have, a remedy for such a case) under the description of a cause matrimonial, for these causes, and testamentary causes, have long been under the jurisdiction of the spiritual court; as the Register says, *causæ quæ non sunt de matrimonio vel testamentis spectant ad curiam nostram;* and it was said, that here the cause was *de matrimonio*, and therefore should be prosecuted in those courts. But it was answered, that the Register is well explained by Fitz, N. B. 44a., where a difference is established between actions for money given during marriage, and given on account of marriage: of the latter case the spiritual court has no cognizance (as it has of the former), because it is not matter solely concerning the marriage, but as a remuneration for it; so in this case the action is not exclusively founded on the marriage, but on the ill behaviour or default of the husband in not providing necessaries for his wife, and therefore the action shall be maintained in the king's courts as well as in the preceding case, for in 48 Ed. 3, 18, it is well said, that all matters concerning marriage are not

matrimonial in such a sense as to fall under the jurisdiction of the spiritual court. As to suing in the spiritual court (for alimony), that is a mysterious thing, and without legal authority, as they assert; for the word (alimony) is a term unknown in our ancient books, and it was never seen in our law as it is in our modern reports in cases *de prohibition.*

Wherefore, they who wish to understand it, must have recourse to ancient books for its definition, which you will find in *Sum. Angl.*, title *Alimenta*, to be such—*similiter nomine alimoniæ veniunt necessaria vitæ quæ important vestes, cibos, medicinas, et hujusmodi.* And inasmuch as this matter is foreign to our books, *Littleton's* argument may be well retorted upon those who argue for the defendant, that if there be any such legal remedy for wives in that case, it must be operative before those courts, without which it cannot exist, &c.

Again, admitting that women may sue for alimony in the spiritual court, in this case the consequence would not follow: for these reasons—1st, that there is no divorce, or any cause of divorce, apparent in the case; and then the judges of the spiritual court informed *Twisden*, J., as he asserts in his argument, that they never allow any suit for alimony, unless after a divorce, and sometimes pending a divorce it has been decreed.

2d. As the wife can sue the husband in the spiritual court for alimony, so can the wife charge the husband in the king's court for necessaries, as has been proved; and parties may make election of their remedies. Those, therefore, on the part of the wife, are plaintiffs here, and have therefore their election to sue in the king's court, and those on part of the defendant wish to refer the plaintiffs to another trial; to do which would be to exclude women from their birthright, for they are entitled to the benefit of the laws, and to have right to them as well as men; and, therefore, if a husband beat his wife, she can bind him to his good behaviour before a justice of the peace, or she may libel him in the spiritual court for a divorce "*causâ sævitiæ.*" Since the suit in this case has been commenced in the king's court, we are bound to extend a remedy to the party, and not to refer him to the spiritual court.

It had been well observed by those who have argued for the defendant (as *Twisden*, Justice, said), that in giving

judgment in a novel case, especially one of such importance as the present, where there is reason to suppose that several remedies are applicable, they should be carefully examined, and that remedy should be adopted which is most beneficial, and such as may, in other cases, restrain husbands from cruelty, and wives from disobedience; and such a remedy the advocates of the defendant have supposed the suit in the spiritual court for alimony to provide.

But *Twisden* said, that he was now strongly impressed with the truth of the opinion, stated by a reverend divine (hard as the saying may appear), "That 'tis more than reason that goes to persuasion." For the very reasons urged by those who have argued for the defendant, of disobedience, which will be encouraged, if the remedy of the wife shall be at common law and not in the spiritual court, lead me to the conclusion, that her remedy shall be limited exclusively to the common law; and that the evil consequences before mentioned will most abundantly ensue, if the suit be in the spiritual court, and not at common law, will be manifest from what follows:—

1. It will make wives refractory and disobedient to their husbands, for the reason that the spiritual courts cannot settle alimony until after separation; of which, if wives were once informed that they can obtain it (instead of seeking reconciliation), they will spare no industry to recover their liberties, and leave no means unemployed that may enable them to go into such companies, and at such times, as they please. And the scandal and ignominy that a wife may thus bring upon a man, who still continues to be her husband, may be well imagined.

2. If the only means of compelling husbands to maintain their wives shall be in the spiritual court, this will make many husbands cruel to their wives, when they know that the most severe punishment which they can suffer is excommunication, and the indifference among men of this day for such a punishment is too well known; and though they are entangled, body and soul, in the meshes of excommunication, they will neither feed nor clothe their wives. And it seems that the parliaments of *later* times have noticed the general disregard for excommunication and imprisonment; and therefore the statute concerning illegitimate children provides, not merely that the putative father shall be sub-

ject to the sentence of the ecclesiastical court, but also that such father shall give security to the parish, &c. And the statute 21 Jac., which provides, that dying in execution shall be no satisfaction for the debt, shows the little regard men have for imprisonment, in which alone the term of excommunication, so far as the bodily senses are concerned, consists. But the statutes do not extend so far as to give satisfaction to wives, whose husbands may stay in prison, while they famish without under their eyes, and for these reasons the remedy in the spiritual court is, in this case, improper.

But it is objected, that, if the remedy be at common law, it is unavailing: because, although the wife may provide necessaries for herself, she has no property in them, and therefore the husband may seize upon them immediately, and strip her of her apparel. To which they answer, that true it is that wives can acquire no property; but yet, if the husband strip her of her apparel and other necessaries, this is a good ground for her to sue a divorce *causâ sævitiæ*, as may be proved by authorities not contained in our books.

III. To examine the circumstances of this particular case; and these are—

1st. The departure of the wife, and her offer of cohabitation.

2d. The prohibition of the husband to trust the wife.

3d. The time in which this action was brought.

The departure of the wife, and her offer of cohabitation—Admitting that her departure was without licence from her husband, this does not impair her right to a provision after her husband's death. And this, even if she remain "*cum adultero*" at common law, as appears by the statute providing that women lose their dower in the case last mentioned; and if this greater offence shall not affect her in her future interest, which is of far less importance than her present support, certainly the fact proved of her departure in this case shall not injure her, as she offers to renew the cohabitation, and she is desirous to expiate her past offence (if offence there was any) by future obedience. Suppose the case of the wife being imprisoned for felony, and the gaoler supplies her with provisions, doubtless the husband shall be liable for all that is furnished; and this is most uncharitable, to suppose the wife, in this case, a greater

offender than in the case last mentioned; hence they conclude, that the wife shall be maintained by the husband, notwithstanding her departure.

2d. The prohibition of the husband to trust his wife. It has been agreed, by all who have argued this case, that if the prohibition had been general, as by posting, or insertion in the "news-book," that no one should trust his wife, this would in itself be void; allowing, therefore, that the husband is liable in *assumpsit* by the law, for this has been argued, it seems clear that he shall continue to be liable, notwithstanding such particular and special prohibition, and that this prohibition is void. The reason why the general prohibition is void is, that, supposing it valid, the power given by the law to the wife, in enabling her to contract, is nugatory, as no one would contract with her; and the same reason applies to this case also: for if the husband can prohibit in the first and second manner, he can, by the same argument, extend his prohibition over the whole kingdom; and then, if the husband should adopt this method, and join the king's enemies, the wife must go too, and then she will be hanged—or stay at home, and then she will be starved; the same evil must happen if the husband should be banished, &c.; wherefore they conclude, that to allow such a prohibition would be equally inconvenient, as not to render the husband liable in *assumpsit*, for necessaries with which his wife has been supplied.

3d. The time in which the action is brought.—And for this reason judgment must be given for the plaintiff, as they said, admitting all that has been argued against them, that wives have no remedy in the king's courts, but only in the spiritual courts; and their reason, in this particular case, that the wife ought to be relieved in the king's courts, was, that the contract, on which the action is founded, was made A.D. 1658, and the action brought 1659, at which time there were no spiritual courts or judges of which the new statute took notice, and therefore no suit could be brought for alimony; wherefore, from necessity and *propter defectum justitiæ*, they might well sue in the courts of the king, as was the former usage and established practice in cases of this nature—as, for instance, to sue for legacies.

Therefore, the three justices conclude that judgment should be given for the plaintiff. And *Twisden*, J. (who

had argued but too well for the plaintiff in the King's Bench) said, that he was not any longer of the same opinion, though he had argued to that effect formerly. For the reasons, which are the causes of such judgments, ought not to be pursued farther than they are sanctioned by experience. And he said, that he had ever accounted it a great honour to Justice *Walshe*, Plowden 375, 6, that, after he had given judgment for the plaintiff in *Stowell* and *Zouche's* case, after hearing the learned argument of the other judges, "*retraxit opinionem*," and gave judgment for the defendant.

Then all the other judges gave judgment for the defendant.

Foster, C. J., *Bridgman*, C. J., *Hale*, C. B., *Hide* and *Browne*, J., of the C. P., *Windham*, of K. B., *Atkins* and *Turner*, Barons of the Exchequer. But though *Atkins* gave judgment for the defendant, yet did he agree in every thing with those who argued for the plaintiff, excepting in what concerned the special prohibition. For he held, that the husband shall be liable in *assumpsit* for necessaries furnished to his wife; but that he may restrain and control particular persons by his prohibition, from delivering any goods to his wife, and as the defendant had given out a prohibition in this case, he gave judgment for him; and, as the justices who argued for the defendant were the more numerous, judgment, for many weighty reasons, was given in his favour.

I will report concisely several points established in this great case:—

First. The resolutions in which all the judges of England agreed, and these were reported by the *Chief Baron* to be, I. That husbands are bound to supply their wives with necessaries; and here they agree *de re*, though they differ *de modo*. II. That the contract of a married woman is merely void, as far as she is concerned, by our law, however it may be different by the civil law. III. If the wife purchase goods, and the husband, by any act precedent or subsequent, ratifies the contract by his assent, the husband shall be liable upon it; if not on his *assumpsit* in law, yet on his *assumpsit* in fact, whether the goods are for himself or for his children, or for his family, all which positions are so obvious, that they require no demonstration.

Secondly. The resolutions of those who gave judgment for the defendant, (except *Atkins*, Baron,) and these were—

I. That the marriage does not give the wife any innate and uncontrollable power to render the husband liable.

II. That, although the wife cannot bind her husband by her contract, yet she is not without a remedy; but by the common law, chancery may order her necessaries, or, at least, the common law (which is subservient to it) in the spiritual court.

III. That if the wife purchase goods, and it is found by special verdict that they were consumed in the household, yet the husband shall not be liable for them. But it shall be good evidence for the jury to find that the husband "assumpsit," but not conclusive evidence.

IV. That admitting that the husband shall be liable in *assumpsit* at law, still, if he specially forbids particular persons to trust his wife, the husband shall not be liable, in spite of this prohibition.

V. Admitting that husbands shall be liable in *assumpsit* at law for necessaries, the finding of the jury that the goods purchased for the wife are necessaries suitable to the degree of her husband, is not good.

(*Note.*—That these justices resolved certain other points in their arguments, but as they do not bear upon the action, the reader will find them at the end of the case.)

I. *That the marriage does not give the wife any innate and uncontrollable power to charge her husband.* This they demonstrate, 1st, by reasons, and 2dly, by authorities. Reasons which are—1stly, The nature of contracts; for in every contract there should be—*First*, The parties contracting, and with reference to this principle, some may be capable, *quoad hoc*, but not *quoad alterum*, as monks, to buy things for their house in vacation; and no other contract made by them is good. But in no case can wives contract, for they cannot be executors without the assent of their husbands; and hence, in this case, the supposed contract is fictitious, that is, the contract between the plaintiff and the husband. *Secondly*, In every contract the consent of the parties is necessary; and every consent is either express or implied. Implied consent is like that of the sheriff to the act of the bailiff, and does not extend to this case. *Thirdly*, In every contract there is a tie or obligation which is the result of it, and this cannot be without lien or other assent. But none of them is here made by the husband; therefore, from the very nature of the contract, the husband, in this case, shall not be liable; and this reason is deduced from the

disability of the person with whom the contract in reality was made.

2ndly. If the law willed to empower wives to contract, the same law would also have given them property that they might retain, and this reason is deduced *ab inutili*, for now that the wife has obtained goods, the husband may seize upon them, and in this way render the purchase useless; or he may detain the wife in his house, and hinder her from going to the mercer's. And even this is not *sævitia*, on which to ground a supplication, for the wife has no power over the actions of her husband, as is proved by the writ *cui in vitâ*, which runs, "*cui in vitâ suâ contradicere non potuit.*" And therefore *Bridgman*, Chief Justice, said, that as far as relates to an act done by a married woman, it is merely void: as if she levy a fine by the name of A., wife of J. S., the fine is merely void, *quia constat* by the record itself that she is married.

3dly. There is greater reason that the wife should take the husband's goods and pawn them, and that the husband should be obliged to redeem them; but the first cannot be done, neither therefore can the second; for, although our law does not exclude the wife from all community in using the goods of her husband, (and therefore it is not felony in her to take them, Stamford, 27B.) yet she cannot dispose of them; and therefore it was adjudged in Trin. 6 Jac. Ro. 1717, *Rice*, *Rey*, and *Thos. Stephen's* case, that where the wife plays at cards and loses 40*l.* of her husband's money, that the husband shall recover this in action against the gamester.

4thly. If the husband shall be bound by this contract, many inconveniences must ensue, as *Wyndham*, Justice, said.

1. The husband will be accounted the common enemy; and the mercer and the gallant will unite with the wife, and they will combine their strength against the husband: so it may be said of them as it was by *Mowbray*, J., 39, ass. 1, in another case:—"We see the wife and the defendant here of one mind, to the prejudice of the husband."

2. The wife, having the goods, will be more violent in enforcing prosecution, than our law permits, an evil which our law guards against: and therefore the goods of felons, during their lives, cannot be granted to any one. See statute 1 R. 3, c. 3.

3. Wives will be their own carvers, and, like hawks, will fly abroad and find their own prey.

4. It shall be left to the pleasure of a London jury to dress my wife in such apparel as they think proper.

5. Wives who think what they have insufficient, will have it tried by a mercer whether their dress is not too mean, and this will make the mercer judge whether he will dispose of his own goods or not. As to the inconveniences supposed on the other part, if the wife may not make the husband liable in cases of necessity, it was answered that in every argument *ab inconvenienti*, the evils on each side must be balanced and examined; and to the inconveniences already enumerated (which will result from thus making the husband liable) may be added, that to define the limits of necessity will be more difficult than the present case, and that they on the other side have not well or sufficiently explained whether they understand *necessitatem convenientiæ*, or *necessitatem naturæ*. But be it how it may, the same necessity which justifies the wife in taking goods from the mercer, would equally justify her in taking money from the usurer, &c.: and, if none will trust her, the same necessity, or a necessity yet more cogent, may qualify her to receive the rents or sell the goods of her husband. Hence, many absurdities must ensue: also, their objection of necessity loses its weight, in another respect, "that the goods are necessaries" (and not "that there was necessity") is the finding of the special verdict. Now necessaries and necessity are topics altogether distinct, and therefore their objecting this "*ingens telum necessitatis*," is nothing to the purpose.

5thly. To charge the husband on the contract of his wife, without his actual assent, will tend to subvert the law of God and of nature, which have given the husband power and government over his wife; and this is the very saying of God himself, "*Erga virum appetitus tuus erit, et ipse regnabit in te*," and as to their supposition, that wives will be starved, our law does not presume this, but the contrary. For the law which preserves such affection between cousins, for the advancement of one by the other, that they shall not be suffered to bar their heirs without leaving them other payment, will presume greater love and affection between husband and wife; who are so identical, as is laid down 21 E. 4, 27, that the obligation of the husband

shall, if extorted by duress of his wife, be void; and so it was adjudged 7 Jac., *Hartwell* and *Witherington's* case. True it is, as has been observed by those who have argued for the plaintiff, that the husband, by marriage, declares that he will sustain and comfort his wife, and that he says he will endow her with his worldly goods. But since husbands are bound, not by the law of God alone, but by the law of nature also, to maintain their wives, yet from this it cannot be inferred that they must be bound by their contracts; since a father, by the law of God and nature, is bound to support his son, and *è contra*, in case the father is impoverished; but no one can infer from hence that one must be liable on the other's contract.

For authorities, *Bill* and *Lake's* case, Hutton's Rep. 106, is an authority in point; for though the case was settled by way of compromise, yet many of the judges delivered their opinion that the husband should not be liable; and *Bridgman*, Chief Justice, said that *Sir Nich. Payne's* case, 6 and 7 Eliz., Dyer, 2346, is more than an authority for them; for he says that our question is there assumed *pro confesso*, and the doubt by Dyer is solely on the payment of the tailor, *scil.*, if this amounts to a consent; and therefore, without this consent of the husband, it is clear that he shall not be liable. Also, they say, that if there were no printed authorities for them, it is clear that no action could lie in such a case, because there is no precedent or authority in its favour, for the only case on which they on the other side rely, is the place, 11 H. 6, 30, 6; which at most is only a single opinion *obiter* by *Martin*, and therefore *Littleton's* argument is extremely applicable to their case, *scil.*, that if any such action could have been brought, it would have been brought before that time, and this is good ground for all judgments of such a nature where the parties have another remedy, as in this case they have, as will be said afterwards, and in this therefore it differs from the case of the executors before mentioned, for in that there was no remedy before. Touching authorities founded on the practice of the late times, *Bridgman*, C. J. of the Bench, said, that though they all feel the greatest reverence for the learning and judgment of those who established it (as is manifest by the respect they show to them in other cases), yet with regard to acts, in doing which they made a virtue of necessity,

nobody can expect that they should be sanctioned longer than the necessity continues; and this necessity, which sprung from the want of courts where the proper remedy could be applied, is now long removed.

II. *That although the wife cannot bind her husband by her contract, yet the wife is not without a remedy, but, by the common law, chancery may order necessaries for her, or at any rate, the canon law, which is subordinate to it, in the spiritual court.*

1. That the wife has a remedy for necessaries by the common law in chancery, according to the opinion of every one, by the writ of "*supplicavit*," which you will find, Register 89, which writ, among other things, orders that the husband *benè et honestè tractabit et gubernabit*, his wife, and then those words, *benè et honestè tractabit*, mean that the husband is bound to provide reasonable *estovers* for his wife, and, among other remedies, you will find 4 H. 3, Ro. Claus. Memb. 11, and 8 H. 3, Ro., where the record says that the viscount distrained on the husband to maintain his wife, and to give her reasonable *estovers;* but the husband there had previously been excommunicated for his obstinacy in not maintaining his wife; and without hazarding any judgment on that point, they all agree in favour of the defendant.

2. If the husband will not supply his wife with necessaries, she must make her complaint to the ordinary, and he may supply a remedy; and, that this is the proper course and best adapted to such a complaint, is manifest.

First. Because common modesty having prohibited such domestic differences between husband and wife from being disclosed before a jury, before whom all evidence must be given in public (which can only serve to embitter such internal quarrels, and to render them irreconcilable, as experience too clearly shows), our law permits that the bishop, who is a spiritual father, should, with the gravity and learning becoming his station, enter into this examination of what is proper, and, from respect to his duty, persuade husband and wife to a reconciliation; and to the same intent that the *arcana familiæ* should not be made public, the bishop himself, as *Bridgman*, C. J., said, ought to examine the matter in private, taking with him his chancellor and his register, and if he finds all persuasion to a reconciliation useless, he must proceed to sen-

tence, and this will be according to the demerit of the wife, and not according to the estate and degree of her husband, as a jury must proceed, which would be a pernicious precedent, since bad women would have as great provision as good women, when the default is on the part of the husband. But in the spiritual court, such bad women as have violated their vows, shall have such provision as clerks convict, Stamf. 140, and shall be fed with the bread of affliction and the water of adversity.

Secondly. Because it is also a matter solely spiritual, as the husband at the marriage endows her with his worldly goods in *facie ecclesiæ*, and they denied what was said on the other side, that the remedy in the spiritual court is only subsequent to the separation. For as the libels in these cases are more frequently *propter sævitiam*, because the default in supplying necessaries is *sævitia*; yet shall there not always be separation on that account. But the husband may agree and give security to maintain his wife, and then they may cohabit; and as to what is said, that the ordinary has no coercive power, it was answered, that their power is of greater extent than any temporal execution, which can at most extend only to the body. But their execution extends to the body and the soul: and this, not only by reason of restraint, as imprisonment of the body, but also by means of disability, incapacitating body and soul from their temporal and spiritual rights, so as to disqualify the offender from receiving the sacrament, or maintaining an action; and therefore it is not to be presumed that the husband will continue in a state of excommunication and starve his wife, more than it is to be supposed that he will kill another from revenge, well knowing that for such a crime he must be hanged. So that, from all that has been said, it appears that the canon law is adequate for all the purposes and exigences of the case (and our law, according to *Bunting's* case, presumes that a fit judgment will be pronounced); but if they proceed wrongly we may interfere by prohibition, and inasmuch as not reasons only are required in this case, our courts are not without precedents, or our books without authorities in point as precedents: *Bridgman*, C. J., cited many, which he held in his hand; anno 1585, the case of the *Lord Zouch and his Wife*, and others who have sued for a remedy in the spiritual court in such a case, and Cro. 2, 364, says that the

court of the ordinary is the proper court for the allowance of alimony, Co. 12, 50.

III. *That if the wife buy anything, and it is found by special verdict that this was consumed in the household, even then the husband shall not be liable for it. But this may be good evidence on which the jury may find that the husband* "assumpsit," *though it is certainly not conclusive.*

1. The first part of the resolution, *viz.*, that the husband shall not be liable without his actual assent; the employment of the goods for the benefit of the household, notwithstanding, is expressly fortified by 34 Ed. 1, Fitz. Dett. 163. In Dett, the event was that the wife of the defendant bought from the plaintiff ten quarters of wheat, which were employed in the service of the defendant, and it was adjudged that the defendant should not be held liable, and such is the conclusion of the case, 21 Hen. 7, 406. If my wife purchase goods for the maintenance of my household, this is good evidence for the jury to have found that the husband undertook, but not binding evidence. If the factor or servant buy goods, and they come to the use of the master, the master shall be liable for them, 6 Eliz.; Dyer, 2306; Doctor and Student, 137, 138; and presumptive evidence shall weigh more in the case of a wife than of a servant: and therefore they said that if the husband is beyond sea in any voyage, and during his absence the wife purchase provisions or other things which are necessaries for her, this is good evidence on which a jury may find that the husband *assumpsit*, and to that effect should the judge direct them, for it is good evidence to presume that the husband has at all times undertaken to pay for necessaries. Therefore it was said that if the wife be absent from her husband and the husband refuse to cohabit with her, and she purchase necessaries, this is good evidence, &c.

But such evidence as has been stated above is not binding and conclusive, but merely presumptive evidence; and for this the *Chancellor of Oxford's* case, 10 Co. was cited, when in trover and conversion it was agreed, that request and denial is good evidence for the jury to find for the plaintiff; but being found specially, the court cannot, therefore, give judgment for the plaintiff, and therefore, in this case, the jury having found the matter specially, the court cannot give judgment against the husband: for, that the goods

were necessaries, and that they were employed, is but matter of evidence, on which the jury should have proceeded to have ascertained the fact, whether the husband undertook or not, which is not the province of the judge, for *ad quæstionem facti non respondent judices.* Also the husband might have rebutted such presumptive evidence by other proofs, as that he gave his wife ready money to make purchases, &c.

IV. *That admitting the husband to be by law liable in assumpsit, yet, if he especially prohibit particular persons from trusting the wife, the husband shall not be liable, in spite of his prohibition.* They all agree that a general prohibition that no one should trust his wife (supposing the husband legally liable in *assumpsit*) shall be void; and it was assimilated to the case where feoffment in fee is made on condition that the feoffee shall not infeoff any one, it is void. But, if it were upon condition that he should not infeoff J. S. or T. N., this is good, and to this purpose is 12 E. 4, 18, & 21 E. 4, 48 a. If the king grants to any one a discharge from service as a juryman, it is good; but if he grant that the whole district (*pais*) shall be discharged from this service, it is bad, since by this means would ensue a failure of justice; and it seems that our case will not differ from the case of a servant, which, although he may have a general authority to purchase goods, may yet be restrained from purchasing things of certain persons in particular. Nor is this an injury to the mercer; for the prohibition serves to give him notice that the purchaser is a married woman, and if after that he will trust her, it is at his peril. But *Bridgman*, Chief Justice of C. P., differed from many in this point, for he said that, supposing it admitted that the husband shall be liable in *assumpsit* on the contract of his wife, then no person could be restrained from selling to the wife by any prohibition of the husband, since the power the wife would have, as must be allowed, would be her inheritance, and uncontrollable; besides, it must be agreed that the general prohibition of the husband is void, because by this the wife will be without relief; and such particular prohibition may have the effect of a general prohibition, if the husband choose particularly to prohibit every one in the country to whom his wife can by any possibility have access, and therefore he agreed in this point with

those who had argued for the plaintiffs; and, on the other hand, supposing the law to be such as the defendant pleaded, that the husband is not liable in *assumpsit* for his wife's contract, then is the prohibition idle and nothing to the purpose, inasmuch as the law forbids any one to give her credit, and so *quâcunque viâ datâ*, this prohibition is immaterial.

V. *That, admitting that husbands are legally liable in* assumpsit *for necessaries, the finding of the jury that the goods in question are necessaries suitable to the degree of the husband, is not good;*—for the law wills that wives should be maintained in a manner suitable, not to the degree, but to the estate of their husbands, and it is not reasonable that the wife of a poor knight of 200*l.* a year shall be arrayed in the same expensive manner as the wife of a knight of 2,000*l.* per annum; and therefore, under the circumstances of this case, it is altogether impossible that judgment should be given for the plaintiff. For the jury ought to have found that the goods were necessaries suitable to the estate and degree of the husband, or that they were necessaries generally.

And, after considerable discussion, judgment was prayed for the defendant in the King's Bench, and given accordingly. Also the judges who pronounced in favour of the defendant, resolved in their argument—

1. That when wives are allowed by their husbands to be housekeepers, and are in the habit of purchasing goods for the household without ready money, in this case the husband is liable, and to this purpose is 14 Hen. 7, Fitz. Dett. 160. If I command my wife to purchase goods, and she purchase them, I shall be liable for them; and so it was agreed, 21 Hen. 7, 406; and so is the constant practice, and it has always been allowed; for in this case the wife is as a servant, and therefore if the wife is in the habit of buying goods for ready money, and the husband empowers her so to act, and after he has so empowered her, countermands her authority, and in such a case the wife buys goods which are employed for the service of the household, yet shall not the husband be liable for them. For it is not the employment of the wife, but the assent of the husband, which is the foundation of the action; and this appears from the cases above cited, and from Br. Contract, 40.

2. It was resolved, that if any one deliver goods to a married woman, whether under colour of contract or otherwise, he cannot charge the husband in any action whatever for their price; for if in such case the husband may be charged for all the goods which the wife took in trover and conversion (as *Twisden's*, Justice, opinion is), it would be useless to consider how husbands may be compelled to support their wives; for in this way every wife may be her own carver, to take and to dispose of as great a quantity of goods as she thinks proper. But our books are not without authorities on this point, as appears by the cases of the *Frères Moneurs*, 11 H. 4, 31, where the case is that they take an infant and put clothes upon him, and the father of the infant gains possession of him again clad in their habiliments, and it was then held that the father should have the apparel in which the infant was clad; for now, by putting them on the back of the infant, the property was in him, and therefore the guardian of the friars could not recover; and *Hawk*, C. J., said: If an adulterer take the wife of another, and clothe her well in new robes, that the husband may retake the wife in her new robes. So if robes be put on an image, the property is in the church; and they declared also that the law was that if any one should deliver goods to an infant by contract, knowing that he was an infant, the infant shall not be liable in trover and conversion for them. For in this way all the infants in England would be ruined; and they remembered that it was doubted whether trover and conversion would lie against a bailiff, as in 11 Jac., Mo. Rep. 841, where it was resolved in the affirmative. But if the goods be delivered to the wife, not knowing that she was married, or to the infant, not knowing that he was an infant, it shall be otherwise.

3. It was resolved by some of the justices that if the wife will not cohabit with her husband, but during the time of her voluntary departure purchases provisions and clothes for herself, and it is given in evidence to the jury that these were necessaries suited to the estate and degree of her husband, yet is this not sufficient evidence to warrant a finding by the jury in *assumpsit* against the husband, and therefore it was said, and not denied, that there is a difference for this purpose between wives that are willing to cohabit with their husbands, and those that spontaneously depart from

them; and this appears by Magna Charta, which provides that wives shall have their quarantine after the death of their husbands, but nevertheless if they choose to depart from the mansion house during any part of the said forty days, they shall not have *estoveria de communi* during that time; and a case between *Waller* v. *Hanger*, 12 Jac., Banc. Reg., was cited, where the king granted to the citizens of London to be free of prisage; and J. S., one of the citizens, who was owner of a ship fraught with wine, was disfranchised before its arrival, J. S. shall pay prisage, for he was discharged solely as a citizen, and therefore, being disfranchised, he loses his privilege. So it was said that the law presumes that the husband will furnish necessaries for his wife so long as she is a member of his family, and that he undertakes to pay for such necessaries. But when the wife voluntarily abandons and relinquishes her family, by this conduct she renders herself incapable of enjoying the before-mentioned privilege, and places herself without the pale of her husband's maintenance; and therefore it shall not be presumed that the husband has entered into such an *assumpsit* in that case.

[*In order to show in what manner the doctrine established by the principal case of* Manby *v.* Scott *has been followed up in later times, the modern cases of* Montague *v.* Benedict, *and* Seaton *v.* Benedict, *which are perhaps the cases most frequently referred to on this subject, are here inserted.*]

MONTAGUE *v.* BENEDICT.

HILARY.—5 & 6 GEO. 4, K. B.

[REPORTED 3 B. & C. 631.]

In assumpsit for goods sold, it appeared that the plaintiff, a jeweller, in the course of two months, delivered articles of jewelry to the wife of the defendant, amounting in value to 83l. It appeared that the defendant was a certificated special pleader, and lived in a ready furnished house, of which the annual rent was 200l.: that he kept no man-servant; that his wife's fortune upon her marriage was less than 4000l.; that she had, at the time of her marriage, jewelry suitable to her condition; and that she had never worn, in her husband's presence, any articles furnished her by the plaintiff. It appeared also that the plaintiff, when he went to the defendant's house to ask for payment, always inquired for the wife, and not for the defendant: Held, that the goods so furnished were not necessaries, and that, as there was no evidence to go to the jury of any assent of the husband to the contract made by his wife, the action could not be maintained.

ASSUMPSIT for goods sold and delivered. Plea, general issue. At the trial, before *Abbott*, C. J., at the Middlesex sittings, after Trinity Term, 1824, it appeared that the plaintiff was a working jeweller, and the defendant a special pleader in considerable practice. The plaintiff, between the 20th October and the 14th of December, 1823, had delivered to the wife of the defendant, at his house in Guildford-street, different articles of jewelry, amounting in the whole to the sum of 83*l.*, and had received from her on account 34*l.* These things were usually delivered about twelve o'clock in the day, and plaintiff never saw any person but the defendant's wife. Upon these facts being proved, the defendant's counsel contended that the plaintiff

ought to be nonsuited, because there was no evidence to show that the husband had any knowledge that the goods had been delivered to his wife, and, consequently, no evidence of his assent to the purchase, and *Metcalfe* v. *Shaw* (*a*), *Waithman* v. *Wakefield* (*b*), *Bentley* v. *Griffin* (*c*), were cited. The Lord *Chief Justice* thought it a question for the jury, whether the articles had been supplied with the assent of the husband. The defendant proved that he was married in September, 1817, and that the fortune of his wife was less than 4000*l.*, and that she received, by virtue of her marriage-settlement, for her exclusive use, a sum of 60*l.* annually; that they inhabited a ready-furnished house in Guildford-street, at the rent of 200*l.* a year; that the furniture of it was not new or expensive, some of it indeed being very shabby; that the defendant kept no man-servant; that his wife, before October, 1823, had jewelry suitable to her condition, and that she had never, in her husband's presence, worn any of the articles furnished by the plaintiff. The defendant usually left his house and went to his chambers about ten o'clock in the morning, and did not return before five in the evening. When the plaintiff or his servant called at the defendant's house, they always asked for his wife, and not for him; and upon one occasion, when the clerk called in March, and stated to the female servant who opened the door, that he called for the purpose of getting settled a bill for jewelry to the amount of 80*l.*, the servant expressed her surprise that the plaintiff had trusted her mistress for such a sum, and said she was sure that her master knew nothing of it, and she swore that the clerk replied, "his master was aware of that." This, however, was denied by the clerk. The Lord *Chief Justice* told the jury, that a husband was not liable for goods supplied to his wife, unless he gave her an express or implied authority to purchase. In considering the question of authority, the estate and degree of the parties was a fit subject for consideration, and so also was the nature of the articles. There were some things which it might and must always be presumed the wife had authority to buy, such as provisions for the daily use of the family over which she presided; but in this case the articles were not necessary to any one; the proof was, that the husband never saw them, and the jury were to say, under these circum-

(*a*) 3 Camph. 22.
(*b*) 1 Camph. 120.
(*c*) 5 Taunt. 365.

stances, whether the wife of the defendant had any authority from him to make a contract for the articles in question. The jury found for the plaintiff to the amount of his bill. A rule *nisi* had been obtained for a nonsuit, on the ground that there was no evidence to be left to the jury of the husband's assent to the contract; or for a new trial, on the ground that the verdict was against the weight of evidence.

Platt showed cause. It was a question for the jury, upon the evidence, whether the articles provided for the wife of the defendant were necessaries suitable to the degree and estate of the husband. The latter is responsible in respect of the contracts made by the wife, for goods suitable to that condition which he suffers her to hold herself out to the world. It is not necessary to show an express assent of the husband to the contract, or that the articles provided were worn in his presence. If they were conformable to the apparent condition of the husband, his assent is to be presumed. Here there was abundant evidence to go to the jury, that the things provided were necessaries suitable to the degree of the husband, for it appeared that he lived in a ready-furnished house, the rent of which was 200*l.* per annum, and that his wife had originally a fortune of 4000*l.*, and if they were necessaries suitable to the degree of the husband, then cohabitation was evidence of his assent to the contract made by his wife. He cited *Morton* v. *Whithy* (*a*).

(*a*) Skinner, 348.

Scarlett and *Gurney*, *contrà*. It appeared upon the trial that the plaintiff, in the course of two months, had delivered to the defendant's wife articles of jewelry amounting to 83*l.*, and that before that time she had articles of that description suitable to her degree. The things provided by the plaintiff, therefore, were not necessaries. There was no evidence of any assent (express or implied) of the husband, to the purchase made by the wife. Cohabitation is only *primâ facie* evidence of such assent, and here it was rebutted by the evidence given on the part of the defendant.

Bayley, J.—It seems to me, that in this case there was no evidence to go to a jury to entitle the plaintiff to a verdict. I take the rule of the law to be this: if a man, without any justifiable cause, turns away his wife, he is bound by any contract she makes, for necessaries suitable to her degree and estate. If the husband and wife live together,

and the husband will not supply her with necessaries, or the means of obtaining them, then, although she has her remedy in the Ecclesiastical Court, yet she is still at liberty to pledge the credit of her husband for what is strictly necessary for her own support. But whenever the husband and wife are living together, and he provides her with necessaries, the husband is not bound by contracts of the wife, except where there is reasonable evidence to show, that the wife has made the contract with his assent; *Etherington* v. *Parrott* (*a*). Cohabitation is presumptive evidence of the assent of the husband, but it may be rebutted by contrary evidence; and when such assent is proved, the wife is the agent of the husband duly authorised. Then the question is, was there any evidence in this case to warrant my Lord *Chief Justice* in submitting, as a question for the consideration of the jury, whether the wife had the authority of the husband to make this purchase? It appears, that the wife had originally a fortune under 4000*l.*; that would yield an income less than 200*l.* per annum. There was no evidence on the part of the plaintiff to show that she had a fortune even to that extent; that fact appeared afterwards upon the defendant's evidence. Then is it to be presumed, that a husband working hard for the maintenance of himself and family, keeping no manservant, and living in a house badly furnished, would authorise his wife to lay out, in the course of six weeks, half of her yearly income in trinkets? If the tradesman in this case had exercised a sound judgment, he must have perceived that this money would have been much better laid out in furniture for the house, than in decking the plaintiff's wife with useless ornaments, which would so ill correspond with the furniture in the house. I think, at all events, there was gross negligence on the part of the plaintiff, if he ever intended to make the husband responsible. If a tradesman is about to trust a married woman for what are not necessaries, and to an extent beyond what her station in life requires, he ought, in common prudence, to inquire of the husband if she has his consent for the order she is giving; and if he had so inquired in this case, it is not improbable that the husband might have told him not to trust her. But no such inquiry was made; on the contrary, the plaintiff always inquired for the wife, and that is

(*a*) Ld. Raym. 1006.

strong evidence to show that she was the person trusted, and not the husband. On the whole, I think that the plaintiff did not make out, by reasonable evidence, that the wife had any authority to make the purchase in question.

Holroyd, J.—I think the plaintiff ought to have been nonsuited. If the plaintiff had made a claim in respect of necessaries provided for the defendant's wife, the case would have stood upon a very different ground; but I think, upon the evidence, it appeared that the things provided were not necessaries. They consisted of articles of jewelry, and the wife had, upon her marriage, been supplied with a sufficiency of such things, considering her situation in life. Undoubtedly the husband is liable for necessaries provided for his wife, where he neglects to provide them himself. If, however, there be no necessity for the articles provided, the tradesman will not be entitled to recover their value, unless he can show an express or implied assent of the husband to the contract made by the wife. Where a tradesman takes no pains to ascertain whether the necessity exists or not, he supplies the articles at his own peril; and if it turn out that the necessity does not exist, the husband is not responsible for what may be furnished to his wife without his knowledge. Where a tradesman provides articles for a person whom he knows to be a married woman, it is his duty, if he wishes to make the husband responsible, to inquire if she has her husband's authority or not; for where he chooses to trust her, in the expectation that she will pay, he must take the consequence if she does not. If it turn out that she did act under the authority of her husband, when she gave the orders, he will be liable, but otherwise he will not. If we were to hold that he would, no man in any case would be safe, if the wife chose to say that she had the authority of her husband. I think that the burden of the proof of the assent of the husband lies on the party who provided the goods, and who acted upon the supposed authority. In this case, it appears to me that the proof was to the contrary, and that it negatived all presumption of assent on the part of the husband. I think, therefore, that the plaintiff did not make out a case to entitle him to recover.

Littledale, J.—I agree in thinking that a nonsuit must be entered. The husband is not liable in respect of a con-

tract made by his wife without his assent to it, and a party seeking to charge him in respect of such a contract, is bound either to prove an express assent on his part, or circumstances from which such assent is to be implied. Then, was there any express assent in this case? So far from that, it appears that no application was made to the defendant for several months after the articles had been delivered; but the plaintiff always called when he knew the defendant was from home, and always asked for the wife. There was, therefore, no express assent of the husband. Then, can we say that there was any implied assent? There are many cases in which the assent of the husband may be presumed. In Comyn's Digest, tit. *Baron* and *Feme*, (Q.) it is laid down, that if the wife trades in goods, and buys for her trade when she cohabits with her husband, his assent is to be presumed; and if a wife buy *necessary* apparel for herself, the assent of the husband shall generally be intended. But here the apparel provided consists of articles of ornament of considerable value. It does not appear, considering the defendant's occupation, and his wife's fortune, that articles of jewelry to that amount can be considered as necessary apparel, and one reason is, because the wife had articles of that description provided for her when she married, and there is no evidence to show that the husband ever saw the wife wearing these articles, and if he did not, then there is nothing to show any implied assent.

Abbott, C. J.—I entirely agree with the opinion which has been delivered by my learned brothers, and I think the rule for a nonsuit ought to be made absolute. If this decision should have the effect of introducing somewhat more caution into the conduct of those who are to obtain their living by selling their goods and wares, it will be most beneficial. It will occasionally be beneficial to infants, to fathers, to husbands, and to friends. It will also be beneficial to those who have goods to sell; for the experience we have in courts of justice leads us to know, that persons who trade without due caution often find their hopes deceived: they find in the result that they have parted with goods for which they never can obtain the money. The rule must be made absolute.

Rule absolute for a nonsuit.

SEATON *v.* BENEDICT.

TRINITY.—9 GEO. 4, C. P.

[REPORTED 5 BINGH. 28.]

A husband, who supplies his wife with necessaries in her degree, is not liable for debts contracted by her without his previous authority or subsequent sanction.

ASSUMPSIT for goods sold and delivered. The defendant pleaded the general issue, except as to 10*l.*, which he tendered and paid into court.

By a bill of particulars, it appeared that the plaintiff's demand amounted to 28*l.* 5*s.* 6*d.*, for kid gloves, ribands, muslins, lace, silks, and silk stockings, thirteen pair of which, of a very expensive description, were charged for, as being delivered on one day.

At the trial before *Burrough*, J., Middlesex sittings after Hilary term last, it appeared that the defendant, a gentleman in the profession of the law, was, at the time when the plaintiff furnished the goods, living with his wife at Twickenham, and had supplied her wardrobe well with all necessary articles; that the plaintiff, a tradesman at Richmond, had, without the defendant's knowledge, furnished the defendant's wife with the articles for which this action was brought, the greater part of which were delivered to her in the plaintiff's shop, and the remainder into her own hand at the defendant's door.

It did not appear that the defendant had seen her wear any of them, except, perhaps, the gloves and some of the silk stockings, the price of which did not amount to 10*l.*

On behalf of the defendant it was contended, that these articles were not necessary for the wife of a person in his degree; that no actual authority for them had been proved: and that an authority could not be implied for the purchase of any thing but necessaries.

The learned judge told the jury he should have been of this opinion, but for the plea of tender; that plea admitted that the wife had authority to purchase some of the articles; and as it was not stated in respect of which of them the tender had been made, it must be taken to apply to all, admitting the authority to purchase them all, and contesting only the price at which they were charged.

A verdict, therefore, was taken for the plaintiff for 18*l.* 5*s.* 6*d.*, with leave for the defendant to move to set it aside, if the learned judge should be thought to have given an effect to the tender which it ought not to have.

Wilde, Serjt. accordingly obtained a rule *nisi* for a new trial, on the ground that the goods furnished were not necessaries, and that no authority could be implied from the tender except an authority to purchase goods to the extent of 10*l.*

Taddy, Serjt. shewed cause. The finding of the jury decides that the articles in question were necessaries in the defendant's station; and his authority for the purchase of them must be implied from the tender. The tender admits the existence and validity of the contract made by the wife; and as it does not distinguish any particular articles in respect of which the money has been paid into court, it must be taken that the only matter in dispute is the amount of the price. In *Bennett* v. *Francis* (*a*), where a defendant who had possessed himself of goods belonging to the plaintiff, and had sold part and kept the residue in specie, paid money into court generally upon a declaration containing a count for goods sold and delivered, it was held, he admitted the transaction to have been converted into a contract. In *Montague* v. *Benedict* (*b*), where the husband was held not liable, the articles were not necessaries; and in *Holt* v. *Brien* (*c*), and *Bartley* v. *Griffin* (*d*), the credit was given to the wife. If this were the case of any other agent, as of a servant, no doubt could be raised, after the tender, of the validity of the contract.

(*a*) 2 B. & P. 550.

(*b*) 3 B. & C. 631; *ante*, 274.

(*c*) 4 B. & A. 252.

(*d*) 5 Taunt. 356.

Wilde.—The tender does not admit a contract beyond the amount of the sum paid into court; *Cox* v. *Parry* (*e*); nor that the goods sold were the property of the plaintiff; *Blackburne* v. *Schoales* (*f*); and will not render the defendant liable if he would not be so upon the facts of the case: as to which, the wife must have an authority like any other

(*e*) 1 T. R. 464.

(*f*) 2 Camph. 341.

agent. If she be not supplied with necessaries by her husband, there is an implied authority to contract for them; but if she be adequately supplied, an express authority must be shewn. The principle has been clearly laid down in *Montague* v. *Benedict*. *Holroyd*, J., says, "The husband is liable for necessaries provided for his wife, where he neglects to provide them himself. If, however, there be no necessity for the articles provided, the tradesman will not be entitled to recover their value, unless he can shew an express or implied assent of the husband to the contract made by the wife." And in *Etherington* v. *Parrott* (*a*) it was holden that the husband was not liable where his wife took up goods and pawned them.

(*a*) 1 Salk. 118.

Best, C. J.—I think there ought to be a new trial in this case. The learned Judge left the point correctly to the jury, but gave too much effect to the payment of money into court. Independently of that, the defendant, in point of law, was entitled to a verdict. A husband is only liable for debts contracted by his wife on the assumption that she acts as his agent. If he omits to furnish her with necessaries, he makes her impliedly his agent to purchase them. If he supplies her properly, she is not his agent for the purchase of an article, unless he see her wear it without disapprobation. In the present case the husband furnished his wife with all necessary apparel, and he was ignorant that she dealt with the plaintiff. No article was delivered in his presence, nor was there distinct proof that any had been worn. If, therefore, money had not been paid into court, the defendant was clearly entitled to a verdict. What, then, is the effect of that payment? If the money had been paid in on the first items of the bill, an authority to contract at the date of these items would have been acknowledged—an authority which could not afterwards have been retracted but by express notice. But there is no evidence to shew that the money was not paid in on the last items; and if so, there was no agency for the first. The payment into court, therefore, recognizes no agency beyond the amount of 10*l*. And, if so, there is no pretence for supporting this verdict. It may be hard on a fashionable milliner that she is precluded from supplying a lady without previous inquiry into her authority. The court, however, cannot enter into these little delicacies, but

must lay down a rule that shall protect the husband from the extravagance of his wife.

(a) *Park*, J., was at the Old Bailey, and *Burrough*, J., gave no opinion.

Gaselee, J. (a) It is difficult to lay down an abstract rule with respect to the liability of the husband; but on the subject of the payment of money into court, I entertain no doubt. Payment into court, generally in *assumpsit*, admits nothing beyond the amount of the sum paid in. Where, indeed, there is a special contract, the payment into court admits that contract; but where, as in the common *indebitatus assumpsit*, the demand is made up of several distinct items, the payment admits no more than that the sum paid in is due.

In *Cox* v. *Barry*, *Blackburne* v. *Schoales*, and *Bennett* v. *Francis*, the claim arose on a single transaction.

On these grounds it seems to me that too much weight was attached to the circumstance of the payment into court. The jury were probably embarrassed by it, and the verdict ought not to stand.

Rule absolute.

PARTS of the celebrated case of *Manby* v. *Scott* are to be found reported by various different authors. The argument of Sir *O. Bridgman* is given at great length in Mr. Bannister's edition of Sir *O. Bridgman's* judgments, from the Hargrave MSS. that of Mr. J. *Hyde* is to be found in 1 Mo. 124; that of *Hale*, C. B, in Bacon's Abridgment, tit. *Baron* and *Feme*. The case is noticed in Keble, 69, 80, 87, 206, 337, 361, 383, 429, 441, 482; 1 Mod. 124; 1 Vent. 24, 42; 2 Vent. 155. The report of Levinz, coupled with that of Siderfin, contains, however, the substance of all the arguments of either side. For the version above given of the report by Siderfin, of the elaborate discussion in the Exchequer Chamber, the author of this note is obliged to the kindness of the learned gentleman whose name appears prefixed to it, and who has, in furnishing it, conferred upon him an obligation, the extent of which it would be difficult for any one, who has not executed a similar translation, to appreciate. It was the want of such a translation that prevented the insertion of this case in the first volume. A better specimen it would be difficult to find, of that laborious process of investigation to which important questions of law were anciently submitted.

The principle affirmed in *Manby* v. *Scott*, and followed up by the late authorities, is to be found as far back as Fitzherbert:—"A man shall be charged in debt for the contract of his bailiff or servant, where he giveth authority to his bailiff or servant to buy and sell for him; *and so for the contract of his wife, if he giveth authority to his wife, otherwise not.*" F. N. B. 120 G. The principle thus laid down by Fitzherbert, and acted on, as has been seen, by the majority of the judges in *Manby* v. *Scott*, *viz.*, that a wife's power, where it exists, to bind her husband, is as his agent, by virtue of an *express* or an *implied* authority derived from him, has never since been shaken. Consequently, wherever it is sought to charge a husband on his wife's contract, made during the coverture, the only question is, as where it is sought to charge him with the contract of any other agent—had the wife, in the one case—or the agent in the other—authority, either *express* or *implied*, to make such a con-

tract? Where an *express* authority is set up, there can, of course, be no difficulty, excepting as to its construction, and the credibility of the witnesses who undertake to prove it. Where an *implied* authority is relied on, it is proved, as we see daily, by the previous conduct of the parties: thus, if one man allows another to accept bills for him, and takes them up when due, he will be bound by an acceptance in his name, given by the same person, even contrary to his wish, until he has given the public due notice that he has revoked his authority. In such cases the implication of authority arises out of the previous acts of the parties; and such an implied authority to bind him, the acts of the husband may confer upon the wife, as well as upon any other person. But there is another species of implied authority with which the wife is invested, and with which no other agent of the husband can be, since it arises out of the relation in which the husband and wife stand to one another; and to this it is that the cases printed in the text, and the observations in this note, are confined.

The cases on this subject are divisible into two classes.

1. *Where the contract made by the wife was made while living with her husband.*

2. *Where the contract made by the wife was made while living away from her husband.*

The principle which governs cases ranging themselves under the former class is, that, *during cohabitation, there is a presumption arising from the very circumstance of the cohabitation, of the husband's assent to contracts made by the wife for necessaries suitable to his degree and estate.* This was laid down by Lord *Holt*, in *Etherington* v. *Parrott*, Salk. 118; Lord Raym. 106; see *Clifford* v. *Laton*, 3 C. & P. 15; M. & M. 101; and see on the question what are articles suitable, &c. *Hunt* v. *De Blaquière*, 5 Bingh. 550; and so far is this presumption carried, that if a man allow a woman to live with him, and pass for his wife, he will be liable for necessaries furnished to her, even by one who was aware of the real nature of the cohabitation. *Watson* v. *Trelkheld*, 2 Esp. 637: see *Blades* v. *Free*, 9 B. & C. 167; *Robinson* v. *Nahon*, 1 Campb. 245; and see *Mace* v. *Cammel*, Lofft. 782; *Edwards* v. *Farebrother*, 2 M. & P. 293; 3 C. & P. 521. It has been also laid down for the same reason—that, namely, of preventing *deceptions*—that though, ordinarily speaking, the presumption of law only extends so far as to ratify the wife's contract for articles suitable to her husband's estate and degree; still, if he knowingly permit her to assume an appearance beyond that estate and degree, he will be liable for articles supplied to her, if suitable to a person entitled to keep up such appearance. *Waithman* v. *Wakefield*, 1 Camp. 120. So that Lord *Holt's* rule might perhaps be better expressed by saying, that the presumption is, that a woman living with a man, and represented by him as his wife, has authority to bind him by her contracts for articles suitable to that station which he permits her to assume.

Here, however, the rule ends; for the presumption, arising out of cohabitation, does not extend so far as to render the husband liable for articles not suitable to his estate and degree, or to the station which he permits his wife to assume: *Montague* v. *Benedict*, *ante*, S. C. 1 C. & P. 356, 502; *Metcalfe* v. *Shaw*, 3 Camp. 22: and, even where the articles supplied are suitable to the wife's condition in life, still the presumption which arises that the husband authorised her to contract for them, is a presumption liable to be rebutted; this was decided in *Manby* v. *Scott*. The same point was also laid down by Lord *Holt* in *Etherington* v. *Parrot*, *ubi supra*. In that case, in an action against the husband for the price of goods supplied to his wife, the evidence was, that she bought the goods to make clothes, and that they cohabited. For the defence, it was proved that she was not in want of clothes when she purchased these; and that the defendant, the last time he paid the plaintiff, *warned the plaintiff's servant not to trust her any more*, and to give his master notice of it. Lord *Holt* said, "While they cohabit, the husband shall answer all contracts of hers for necessaries, *for his assent shall be presumed* to all *necessary* contracts upon account of the cohabiting, *unless the contrary appear*: but, if the contrary appear, as by the warning in this case, there is no

room for such a presumption." See 1 Bac. Abr. 296; *Seaton* v. *Benedict, ubi supra; Holt* v. *Brien*, 4 B. & A. 252, where it was held that if a husband, *not separated from his wife*, make her an allowance for necessaries during his temporary absence, and a tradesman, *knowing this*, supply her with goods, the husband is not liable. *A fortiori*, where the tradesman, although he knew the wife to be a married woman, elected to give credit to her, not to her husband, the latter is not liable to him. *Bentley* v. *Griffin*, 5 Taunt. 356.

The next class of cases is that in which the wife, at the time of making the contract, is living apart from the husband. We have just seen that, during the cohabitation, the presumption is, *until the contrary be shown*, that she has authority to contract for necessaries. But in the class of cases we are now considering, the presumption is the other way; and it lies on the creditor to show that she is living apart from the husband under such circumstances as give her an implied authority to bind him. And this is just; for, when a tradesman sees two persons living together as man and wife, he naturally infers that there is that degree of confidence and affection subsisting between them, which would induce the one not to contract without authority, and the other to confer such authority for necessary purposes. But when a tradesman finds a woman living alone, the presumption is quite the other way; and he must naturally suppose that she is either a *feme sole*, or, if he know her to be married, that she is not on such terms of confidence and affection with her husband as could induce him to entrust her with authority to bind him by her contracts; and, therefore, in *Mainwaring* v. *Leslie*, M. & M. 18, where goods, the price of which was sued for, were ordered by, and delivered to, the defendant's wife, but she was living separate from her husband, and no evidence was given of the circumstances or cause of the separation, the Lord C. Justice *Abbott* nonsuited the plaintiff, saying, "The plaintiff must be called: where the wife is *not living with the husband*, there is no presumption that she has authority to bind him, even for necessaries suitable to her degree in life; *it is for the plaintiff to show that, under the circumstances of the separation, or from the conduct of the husband, she had such authority.*"

From the rule thus laid down by Lord *Tenterden*, it will be seen that, as the presumption *in favour of the husband's liability*, arising from cohabitation, is liable to be rebutted, so also is the presumption *against his liability*, arising from the absence of cohabitation. It remains, therefore, to inquire in what cases the husband will be liable on the wife's contracts for articles suitable to her degree in life, though she be not cohabiting with him.

On this subject the rule was very clearly laid down by Lord *Mansfield*, in *Ozard* v. *Darnford*, S. N. P. 269, *viz.* that "where husband and wife live separate, the person who gives credit to the wife is to be considered *as standing in her place*, inasmuch as the husband is bound to maintain her, and the spiritual court will compel him to grant her an adequate alimony. But if she elope from her husband, and live in adultery, or if, upon separation, the husband agrees to make her a *sufficient* allowance, *and pays it*, in either of those cases the husband is not liable, because, in the former case, she forfeits all title to alimony, and in the latter, has no further demands on her husband. And as, in all cases, the creditor is to be considered as standing in the wife's place, it imports him, when the wife lives apart from her husband, to make strict inquiry as to the terms of separation; for in such cases he must trust her at his peril." In that case the defendant and his wife had separated, and the defendant had agreed to make her an allowance, *but had not paid it:* there was, therefore, a verdict against him. The allowance, within the above rule, must be *sufficient* according to the wife's degree; and its sufficiency is a question proper for the consideration of the jury. *Hodgkinson* v. *Fletcher*, 4 Camp. 70; *Ludlow* v. *Wilmot*, 2 Stark. 86. It must also, as we have seen, be paid; and if unpaid, the wife, although the maintenance be secured by deed, is not put to her remedy on that, but may bind the husband by contracting. *Nurse* v. *Craig*, 2 New. R. 148. Nor is his liability

destroyed by a decree for alimony, unless the alimony be duly paid. *Hunt* v. *De Blaquière*, 5 Bingh. 550.

From the above it will appear, that if the husband and wife separate *by mutual consent*, the wife has an implied authority to bind the husband for articles suitable to her degree, unless she have an adequate allowance, *and* unless that allowance be duly paid to her. But this implied authority exists only in cases of such *mutual consent* to live apart; for where a wife, in pursuance of invalid articles of separation, quitted her husband's house against his will, and lived apart, he being anxious to receive her into his house, and provide for her, the court was of opinion that he was not liable to her tradesmen even for necessaries; and seemed to think that he would not have been so, even had the articles been valid ones. *Hindley* v. *Marquis of Westmeath*, 6 B. & C. 200: see also *Horwood* v. *Heffer*, 3 Taunt. 421; *sed vide Houliston* v. *Smyth*, 3 Bingh. 127; *Emery* v. *Emery*, 1 Y. & J. 501.

There are two cases for which this is, perhaps, the fittest place, and which seem at first sight somewhat anomalous; those, *viz.* of *Harrison* v. *Hale*, 1 M. & Rob. 185, and *Hornbuckle* v. *Hornbury*, 2 Stark. 177, in both of which a husband was held liable, on an express promise, to pay debts of his wife contracted during separation, though he allowed and paid her maintenance. It is sensibly remarked, in a note of the learned reporter's, that it is difficult to conceive how this promise could be treated as anything save *nudum pactum*, unless, indeed, upon the ground that it constituted in itself strong evidence that the maintenance allowed the wife was insufficient.

Where, therefore, the husband and wife separate *by mutual consent*, the husband will be liable, unless he *allow* and *pay* her a sufficient maintenance. The next case of his liability is, that in which he either *unjustly* expels his wife from the marital roof, or (which amounts to the same thing in law as well as reason) forces her to abandon it by his cruelty. "If a man," said Lord *Eldon*, in *Rawlyns* v. *Vandyke*, 3 Esp. 251, "will not receive his wife into his house, he turns her out of doors, and if he does so, he sends with her credit for her reasonable expenses." "Where a wife's situation in her husband's house," said Lord *Kenyon*, C. J., in *Hodges* v. *Hodges*, 1 Esp. 441, "is rendered unsafe from his cruelty or ill-treatment, I shall rule it to be equivalent to his turning her out of the house; and that the husband shall be liable for necessaries furnished to her under these circumstances." *See, in support of this doctrine*, *Thompson* v. *Hervey*, 4 Burr. 2177; *Houliston* v. *Smyth*, 3 Bingh. 127; *Boulton* v. *Prentice*, Str. 1214; *Aldis* v. *Chapman*, S. N. P. 8th ed. 272, where the wife left the husband's house on account of his having introduced a prostitute. In another case, this circumstance, coupled with others of great cruelty, were held not sufficient to invest her with an implied authority to bind the husband, after escaping from his house. *Horwood* v. *Heffer*, 3 Taunt. 421. But this case is contrary to some of those above cited; and, *quære, whether it can be now treated as law.* It will be observed, that in the above cases, *viz.* where the husband and wife separate by consent, and he neglects to pay her an adequate sum for maintenance, or where he turns her out of doors, and treats her with such cruelty that she is forced to leave him, her right to bind him for her necessary expenses does not rest on a mere *primâ facie* presumption of authority, subject to be rebutted, but on an irrebuttable presumption of law. This was the point decided in *Boulton* v. *Prentice*, Str. 1214, the best report of which is to be found in Mr. Selwyn's *Nisi Prius*, 8th ed. 272. In that case, the husband had driven his wife out of the house by cruelty: the plaintiff was a person whom, during the cohabitation, he had expressly forbidden to trust his wife, but who had, after the separation, supplied her with necessaries, for which he sued the husband. It was objected to his claim, that the credit given to the wife is grounded on the supposed assent of the husband, which assent cannot be supposed where there is an express prohibition. But the court resolved, that "though the prohibition took effect and continued in force *during the cohabitation*, yet such prohibition could not, *after the cohabitation ceased*, either extinguish or lessen the credit to which the wife was *by law*

entitled, after the husband had turned her away, and refused to maintain her: for the husband, by such conduct, gave the wife such a general credit as amounted to a revocation of the prohibition. If the husband, in a case of this kind, could prohibit one person from trusting his wife, he might *pari ratione* prohibit many; and this might be extended so far as to deprive the wife from obtaining any credit whatever, so that particular prohibitions might amount to a total prohibition."

Where, however, the husband and wife live separate, and the husband pays the wife an adequate allowance, he is not liable to her debts, even for necessaries. *Hodgkinson* v. *Fletcher*, 4 Camp. 70. In this case, the husband and wife separated by mutual consent, and the wife had an allowance: but the question left to the jury was, whether that allowance was or was not *adequate*. Lord *Ellenborough*, who tried the case, does not seem to have thought it a material question, whether the tradesman had or had not notice of the allowance. In point of fact, he had no notice even of the coverture. But in *Rawlyns* v. *Vandyke*, 3 Esp. 250, Lord *Eldon* is certainly reported to have said, that "where the tradesman's demand is for necessaries, it is incumbent to show that he knew of the separate maintenance:" (see *Todd* v. *Stokes*, Lord Ray. 444; Sal. 116.) This opinion certainly is at variance with the rule laid down by Lord *Mansfield*, *viz.* that the tradesman stands in the place of the wife: and, as is above said, if Lord *Ellenborough*, in *Hodgkinson* v. *Fletcher*, had thought the point of *notice* important, he would not have allowed that case to turn, as it did, altogether on the *inadequacy* of the maintenance. Neither was the above opinion necessary to uphold the verdict in *Rawlyns* v. *Vandyke*, since there was evidence in that case of such implied authority as would have enabled an ordinary agent to bind the defendant, for he had twice before liquidated the wife's bills while living apart from him; and though he had given the plaintiff orders not to trust her, yet he contended that those orders had not been given till the articles in question had been actually supplied. In *Turner* v. *Winter*, S. N. P. 262, Lord *Mansfield* nonsuited the plaintiff on proof of the allowance, though the plaintiff had no notice whatever of it. This case, which seems to have turned on the necessity of notice, is directly opposed to the *dictum* in *Rawlyns* v. *Vandyke*; and on the authority of this, as well as upon principle, it is submitted that the question, *whether the tradesman have or have not notice of the maintenance*, cannot be material: see Lord *Tenterden's* observations in *Clifford* v. *Laton*, Moo. & Mal. 102. Indeed the ruling in that case seems scarce consistent with the *dictum* in *Rawlyns* v. *Vandyke*. In *Clifford* v. *Laton*, the wife, who lived separate, had an adequate maintenance, *not paid by her husband*, but arising from another source, and this was held an answer to an action against him for the price of necessaries. It does not seem to have been thought in that case material to inquire, whether the tradesman knew that the lady had such a fund at her disposal. On the contrary, the Lord *Chief Justice* says, "If a shopkeeper *will* sell goods to every one who comes into his shop, *without inquiring into their circumstances*, he takes his chance of getting paid; and it lies on *him* to make out, by full proof, his claim against any other person." As to the principal point in *Clifford* v. *Laton*, see *Ludlow* v. *Wilmot*, 2 Stark. 86. But though, if the wife, living apart, have sufficient funds of her own, that exempts the husband from liability: a pension, revocable at pleasure, is not a sufficiently stable fund for that purpose. *Thompson* v. *Hervey*, 4 Burr. 2177. Nor is it enough to show that property has been given in trust for the wife, without showing that the trustees have acted thereupon. *Barrett* v. *Booty*, 8 Taunt. 343.

The next case is that in which the wife is separated from the husband by *act of law*. See *Fowles* v. *Dinely*, Str. 1122. The most ordinary instance of this sort is, that of divorce *a mensâ et thoro*, by the decree of the ecclesiastical court. In such a case, it is a question entirely for that court, whether it will or will not award her alimony. (See 5 T. R. 679.) If the ecclesiastical court refuse her alimony, (which it does in cases of adultery,) she has no power to bind the husband even for necessaries. If it allow her alimony, she has no power to bind him

if he pay the alimony, even though that alimony be insufficient, for the ecclesiastical court is to judge of its adequacy; and a court of law cannot entertain the question, even though the decree have, in point of form, ceased to be operative, provided it is renewable on application. *Wilson* v. *Smyth*, 1 B. & Ad. 801. But, if the alimony be not paid, the wife's power will revive; *Hunt* v. *De Blaquière*, 5 Bingh. 550, and so pending the suit; nor does a decree for alimony, to be paid from a time past, remove his liability for necessaries supplied to her during that past time. *Keegan* v. *Smith*, 5 B. & C. 375.

However, as has been already said, where the husband and wife are living separate, the presumption is *primâ facie against* her power to bind him; and, unless the plaintiff can remove that presumption, by showing some justifiable cause for her living apart, he will of course be defeated. See *Reed* v. *Moore*, 5 C. & P. 200; *Mainwaring* v. *Leslie*, M. & M. 18, 2 C. & P. 507. "The mischief," said Lord *Tenterden* in the last-named case, "of allowing the ordering of goods by a married woman living apart from her husband, to be *primâ facie* evidence to charge him, would be incalculable." *A fortiori*, where it appears that the wife's own misconduct is the cause of the separation, she carries with her no implied authority to bind the husband. Thus, where he has turned her away for adultery, *Ham* v. *Toovey*, S. N. P. 268; or where she has eloped with an adulterer, *Morris* v. *Martin*, Str. 647; *Mainwaring* v. *Sands*, *ib.* 706; or even where her husband, who was himself living in adultery with another woman, turned her out of doors, and she afterwards committed adultery. *Govier* v. *Hancock*, 6 T. R. 603. Nor where she elopes, though she has not committed adultery. *Child* v. *Hardyman*, Str. 875. But where a man, knowing his wife to have committed adultery, allowed her to remain under the marital roof, with children bearing his name, his liability continued. *Norton* v. *Fazan*, 1 B. & P. 226. And the husband's liability revives, if he take the adulteress back into his house; and if he turns her out again, he turns her out with credit for her necessaries. *Harris* v. *Morris*, 4 Esp. 41.

Lastly, as the wife's power to bind the husband, in consequence of the relation that subsists between them, is only in respect of necessaries suitable to her condition, the question frequently arises—*what are necessaries?* This, it is obvious, is a proper question for a jury, and the answer will, of course, much vary according to the wife's station in life. See *Hunt* v. *De Blaquière*, 3 M. & P. 108; 5 Bingh. 550. The costs of articles of the peace exhibited against himself, in consequence of his outrageous conduct, were in one case, recovered against the husband as necessaries. *Shepherd* v. *Mackoul*, 3 Camp. 26. See *Williams* v. *Fowler*, M'Clell. & Y. 269. But a person who advances money to her to conduct the prosecution of her husband for assaulting her, cannot recover it as necessaries, for it cannot be necessary for her safety to prosecute him; since, by having him bound over to keep the peace, she may secure herself against a repetition of ill-treatment. *Grindell* v. *Godmond*, 5 Ad. & Ell. 755. Nor are the costs of a counterpart of the deed of separation necessaries. *Ladd* v. *Lynn*, 2 Mee & W. 265. See further on this subject, Skinner, 349; *Harris* v. *Lee*, 1 P. Wms. 482; and *Ewers* v. *Hutton*, 3 Esp. 255; in which Lord *Eldon* told the jury, that their verdict must be regulated by the husband's circumstances, not by a regard to the amount of fortune brought him by the wife.

ROE *v.* TRANMARR.

HILARY.—31 *GEO.* 2.—*In C. P.*

[REPORTED WILLES, 682.]

2 Wils. 75, S.C. *A., in consideration of natural love, and of* 100*l. by deeds of lease and release*, granted, *released and confirmed certain premises*, after his own death, *to his brother B., in tail, remainder to C., the son of another brother of A., in fee; and he covenanted and granted that the premises should after his death, be held by B. and the heirs of his body, or by C. and his heirs, according to the true intent of the deed. Held, that the deed could not operate as a release, because it attempted to convey a freehold in futuro, but that it was good as a covenant to stand seised.*

A SPECIAL case was reserved on the trial of this ejectment at the assizes at York. By deeds of lease and release, dated the 9th and 10th of November, 1733, Thomas Kirkby, in consideration of natural love to his brother, Christopher Kirkby, and of 100*l.*, *granted*, released, and confirmed to Christopher Kirkby, the premises in question; *after the death of* Thomas Kirkby, to hold to the said C. Kirkby, and the heirs of his body; and after their decease to John Wilkinson [the lessor of the plaintiff], eldest son of his (the grantor's) well-beloved uncle, John Wilkinson, and his heirs and assigns, and to the only proper use of the said J. Wilkinson the younger, "his executors, administrators, or assigns, for ever;" he, the said J. Wilkinson the younger, paying to the child or children of his (the grantor's) brother, Stephen Kirkby, 200*l.* [and for want of such children, to other nephews and nieces therein mentioned;] and for want of such children, the estate was to be free from the payment of the sum of 200*l.* The release contained covenants from the grantor, that he was seised in fee of the

premises in question; and that it should be lawful for Christopher Kirkby, or J. Wilkinson the younger, after his (the grantor's) death, peaceably and quietly to hold, &c. And it was thereby covenanted, *granted*, and agreed, by and between the said parties, that all fines, recoveries, and other assurances of the said premises already levied, suffered, and executed by and between the said parties, should enure to and for the only use and behoof of Christopher Kirkby, and the heirs of his body: and for want of such issue, to the proper use and behoof of John Wilkinson the younger, his heirs and assigns for ever, according to the true intent and meaning of those presents. At the time of executing the deeds, Christopher Kirkby paid 20*l.*, part of the consideration in money, and gave his note for the remainder: and a receipt was signed by T. Kirkby for the whole sum. T. Kirkby continued seised of the premises in question, until his death in 1744. Christopher Wilkinson died in the year 1740, without issue; J. Wilkinson, the lessor of the plaintiff, had no notice of the deeds of lease and release until a short time before the ejectment was brought.

The case was argued on the 9th of February, 1756, by *Willes*, Serjt., for the plaintiff, and *Poole*, Serjt., for the defendant; a second time on the 25th of June, 1756, by *Hewitt*, Serjt., for the former, and *Prime*, Serjt., for the latter: and again a third time on the 23d of June, 1757, by *Hewitt* Serjt., and *Prime*, Serjt. And

Willes, Lord Chief Justice, now delivered the opinion of the Court, as follows, first stating the case:

It is admitted that this deed will not operate as a release, because it grants a freehold *in futuro*, which cannot be done. The only question therefore is, whether, in respect to John Wilkinson the lessor of the plaintiff, it can operate as a covenant to stand seised? If it can, he ought to recover in this suit; if it cannot, judgment must be for the defendants.

A great many cases were cited in the argument of this cause, and to be sure there are a great number of cases not quite consistent with one another upon this question, what shall amount to a covenant to stand seised. But as I think that this case rather depends upon the general reason of the law, and some particular rules that have been laid down

in respect to covenants to stand seised, I shall not go through all the cases that have been cited, but shall only mention some few of them as authorities in point, for the opinion which I am going to give, and two or three that were cited on the other side, to shew that the judgment which we are going to give, does not clash with any of them.

And we are all of opinion (for my Brother *Bathurst*, though absent, has given me leave to say that he is of the same opinion with us) that this deed of release may operate as a covenant to stand seised.

And first we found our opinion on the general rules of law, in respect to the exposition of deeds, which are laid down in many of the books, and which are collected out of them by Shepherd on Common Assurances, pp. 82 and 83; in which he says, that *benigne faciendæ sunt interpretationes chartarum, ut res magis valeat quam pereat*, and that *verba intentioni, et non e contrà, debent inservire.* And therefore (he says) that deeds which are intended and made to operate one way, may operate another way, if the intention of the parties cannot take place, unless they operate a different way from what they were intended; and he puts these instances (amongst others) that a deed intended for a release, if it cannot operate as such, may amount to a grant of a reversion, an attornment, or a surrender, and so *e converso.* And that if a man make a feoffment in fee with a letter of attorney to give livery, and no livery is given, but there is in the same deed, a covenant to stand seised to the uses of the feoffment, if this be in such a case where there is a consideration sufficient to raise the uses of the covenant, it will amount to a covenant to stand seised. In the case of *Crossing* v. *Scudamore* (*a*), which I shall mention more particularly by and by, Lord Ch J. *Hale* cites the opinion of Lord *Hobart*, in fo. 277, and declares himself to be of the same opinion, that the Judges ought to be curious and *subtle* (Lord *Hobart* used the word *astuti*) to invent reasons and means to make acts effectual, according to the just intent of the parties. And it is said in the case of *Osman* v. *Sheafe* (*b*), which I shall have occasion likewise to mention again presently, that the Judges in these later times (and I think very rightly) have gone farther than formerly, and have had more consideration for the substance, to wit, the passing of the estate according to the intent of the parties, than the

(*a*) 2 Lev., 9: 1 Ventr. 137; and 1 Mod. 175.

(*b*) 3 Lev. 370; and Carth. 397.

shadow, to wit, the manner of passing it. These are the general reasons that we go on: and we think that all the particular rules that have been laid down in respect to covenants to stand seised, all concur in the present case. I know of no others but these—

1st. That there must be a deed.

2d. That there be words sufficient to make a covenant.

3d. That the grantor or covenantor must be actually seised at the time of the grant.

4th. That the intent of the grantor must be plain.

5th. That there be a proper consideration to raise the use.

First. This is certainly a deed; and, though it cannot operate as a release, it, being signed, sealed, and delivered by the party, does not cease to be a deed.

Secondly. That there are sufficient words to make a covenant, I shall shew more particularly by and by: but if there were no other word but the word *grant*, that would be sufficient according to all the cases.

Thirdly. It is admitted, and so stated in the case, that the grantor, Thomas Kirkby, was actually seised at the time of the grant.

Fourthly. Nothing can be more plain than that the grantor intended that the lessor of the plaintiff should have the estate after the death of Christopher Kirkby, without issue; it is said so in express words in three places in the deed: what estate he was to take is not material at present, he being still living.

Fifthly. Here is a plain consideration as to Wilkinson, the lessor of the plaintiff: he is called in the deed, eldest son of his well-beloved uncle, John Wilkinson. If it were not so said in the deed, his relation to the grantor might be averred and proved, according to the case of *Goodtitle* v. *Petto*, 2 Stra. 359, and several cases that are there (*a*) cited out of Lord *Coke's* reports.

(*a*) And *Filmer* v. *Gott*, 7 Bro. Parl. Cas. 70; and *R.* v. *The Inhabitants of Scammonden*, 3 D. & E. 474.

Having mentioned the general reasons, and likewise the particular rules on which we found our opinion, I shall now mention some few cases which I think are authorities in point. I shall not take notice of the ancient cases, because of late the courts of law have gone much farther in the determination of this question, and likewise because there are several rules laid down in those ancient cases, which

are not now adhered to. But I shall begin with the case of *Crossing* v. *Scudamore*, Tr. 23 Car. 2, in B. R.; and P. 26 Car. 2, in Cam. Scacc.; reported in 1 Mod. 175; 2 Lev. 9, and 1 Ventr. 137; *Coultman* v. *Senhouse*, E. 30 Car. 2 B. R.; Sir T. Jon. 105; *Walker* v. *Hall*, 29 Car. 2, in Scacc. 2 Lev. 213; *Harrison* v. *Austin*, Tr. 3 J. 2 B. R. Carth. 38—9; *Baker* v. *Lade*, B. C. H. 2 W. & M. 3 Lev. 291; and *Osman* v. *Sheafe*, 3 Lev. 370, 5 W. & M. B. C. [His Lordship here stated and commented upon the cases.] These are all the authorities that I shall mention for the opinion that I am going to give, and I think that these are sufficient.

But before I give the judgment of the court, I shall take notice of some objections that were made on the part of defendants, and two or three cases that were cited to support them.

1st. It was objected that the lessor was no party to the deed: but, to be sure, this is no objection. It is not necessary that a person taking under a deed should be a party; remainders are most commonly limited to persons who are not parties, and especially in covenants to stand seised.

2dly. That there was no consideration as to Wilkinson: but this I have answered already.

3dly. That it was intended to be a deed at common law, and therefore cannot operate by the Statute of Uses. This is founded on the *dictum* in Co. Lit. 49. "Where a man hath two ways to pass lands, and both be by the common law, and he intendeth to pass them by one of the ways, *ut res magis valeat* it shall pass by the other. But where a man may pass lands either by the common law or by raising of an use and settling it by the statute, there in many cases it is otherwise." But that rule has not been observed for above an hundred years last past; and most of the cases cited are determined contrary to that rule. Nor does Lord *Coke* lay it down as a general rule; but he only says, that is so in *many* cases. And Shepherd, in his book of Common Assurances, which I have already mentioned, who has *verbatim* transcribed the words of Lord *Coke*, puts a case, which I have already mentioned, directly contrary to this rule.

4thly. The next objection was, that the deed was void,

and cannot operate at all. If by this be meant void as such a deed which it was intended to be, all the cases are against the objection. If it were meant a void deed, this, as I have already shown, is not so, it having been duly executed by the grantor.

5thly. But the main objection, and which the cases (of which I shall take notice) were cited to support, was, that no estate passed by this deed to Christopher Kirkby, out of whose estate the other estates are to arise; and it is admitted that he can take no estate by this deed. To support this objection were cited, *Atwaters* v. *Birt*, 43 Eliz. B. C. Cro. Eliz. 856; *Hore* v. *Dix*, H. 12 Car. 2, B. C. 1 Sid. 25; and *Samon* v. *Jones*, 2 Ventr. 318. If this objection had not been so solemnly determined in these cases to be a good one, I own I should have been of another opinion; because, in a covenant to stand seised, the estate properly arises out of the estate of the grantor, and his intent that it should not (I think) signifies nothing. For though his intent is to be regarded, *what estate* is to pass, *and to whom*, I do not think it is all to be regarded *as to the manner* of passing it (of which he is supposed to be ignorant); if it were, it would overturn almost all the cases. But I choose, rather than contradict such great authorities, to distinguish the present case from them, and I think it is plainly distinguishable. For, in the present case, the estate to Wilkinson could not be to arise out of the estate of Christopher Kirkby; 1st, because he was intended only to have an estate for life, or at most an estate-tail; and, 2dly, because the lessor's estate is not to commence until after the estate granted to Wilkinson.*

There is likewise one thing in the present case much stronger than in any of the cases that have been cited on the one side or the other: for here is not only the word *grant*, which has been often construed as a word of covenant, but likewise the grantor expressly covenants in two places in the deed, that the estate shall go to John Wilkinson in such manner as he has granted it.

For these reasons we are all of opinion that this deed will amount to a covenant by the grantor to stand seised to the use of John Wilkinson, and that therefore he ought to have the benefit of the verdict, and may enter up judgment upon it.

* *Sic* in the original, but this must be a mistake for *Christopher Kirkby*.

This case, as well as that of *Manby* v. *Scott*, was originally intended for insertion in the first volume. The principle which it carries out, and is usually cited to illustrate, is one of the highest importance, and is indeed the main one upon which the construction of every written instrument hinges. It is expressed in the two maxims,—*Quando res non valet ut agas valeat quantum valere potest*, and *Benigne faciendæ sunt interpretationes chartarum propter simplicitatem laicorum, ut res magis valeat quam pereat.* Thus a deed of bargain and sale, void for want of inrolment, will operate as a grant of the reversion. (See *Preston's* note to Shep. Touch. 83; *Smith* v. *Frederick*, 1 Russ. 210; *Haggerston* v. *Hanbury*, 5 B. & C. 101); and see *Goodtitle* d. *Edwards* v. *Bailey*, Cowp. 600; *Gibson* v. *Minet*, 1 H. Bl. 569, 3 T. R. 481; *Doe* v. *Simpson*, 2 Wils. 22. See too *Chester* v. *Willan*, 2 Wms. Sand. 97a, and the cases collected in notes thereto; and see *Doe* v. *Salkeld*, Willes, 673; the judgment of the *C. J.* in *Parkhurst* v. *Dormer*, *ibid.* 332; and Com. Di. title *Parols*. Many instances of the application of this doctrine will be found in Shepherd's Touchstone, 81, *et seq.* For instance, "If divers join in a deed—and some are able to make such a deed, and some are not able—this shall be said to be his deed alone that is able;" a familiar instance of which will be found in the note to *Moss* v. *Gallimore*, *ante*, vol. 1, p. 317, in the case of a mortgagor and mortgagee making a lease jointly, which enures as the lease of one and the confirmation of the other. So "If a lease be made to one that is incapable and others that are capable, in this case it shall enure only to him that is capable," &c. And it is further laid down in the same valuable work, Shep. Touch. 83, that "when a deed may enure to divers purposes, he to whom the deed is made shall have election which way to take it, and he shall take it in that way which shall be most for his advantage; as if one have a rent out of land of which I and my wife are jointly seised, and he doth by his deed release, give, and grant this rent to me, I may use this as a release to extinguish the rent, or as a grant of the rent, as it may make most for my advantage. But where any inconvenience would arise from the election, there the grantee shall not have an election." One of the latest instances of the application of the doctrine cited as in *Roe* v. *Tranmarr*, is to be found in *Doe* v. *Davies*, 2 Mee and Welsb. 511, which was decided on the authority of the principal case of *Roe* v. *Tranmarr*, and bears a good deal of resemblance to it.

There are several rules of construction adopted by the courts, subsidiary to the above doctrine, and for the purpose of carrying it out; as, for instance, that too much stress is not to be laid on the strict and precise meaning of words where the intention is manifest; for *qui hæret in literâ hæret in cortice*, and *verba intentioni debent inservire, non e contra.* Hence the power which the court exercises in marshalling the words of a written instrument so as to carry the intention into effect. See *Atto* v. *Hemmings*, 2 Bulst. 282, as in those cases in which words have been distributed among different subjects *referendo singula singulis*; (see *Cook* v. *Gerrard*, 1 Wms. Sand. 170, *et notas.*), Nay, there are cases in which the very same words have been construed to bear different meanings in respect of the legal properties of different subject-matters, as in *Forth* v. *Chapman*, 1 P. Wms. 667; see *Burton* v. *Barclay and Perkins*, 7 Bingh. 749. So where one writing contains two distinct instruments, e. g. a lease and release, the court will read that first which must be looked on as the first in point of time, in order to accomplish the intention of the parties. 1 Freem. 251, 2 Mod. 252, *et vide Bredon's case*, 1 Co. 76. Hence, too, the doctrine of *Cy-pres* (as it is called), the principle of which in wills is, that where there is a general and also a particular intention, and the particular intention cannot take effect, the words shall be so construed as to give effect to the general intention. See Preston's Shep. Touch. 87, and the expressions of *Buller*, J., 2 T. R. 254. A further consequence of this rule is expressed in the maxim, *Mala grammatica non vitiat chartam*, and there have been cases in which the word *and*, in furtherance of this doctrine, has been read *or*; see *Chapman* v *Dalton*, Plowd. 289; 1 Inst. 225a. Again, the construction must be made *on the en-*

tire instrument, after looking, as the phrase is, at the four corners of it, *Ex antecedentibus et consequentibus fit optima interpretatio*, and *verba posteriora propter certitudinem addita ad priora quæ certitudine indigent sunt referenda;* see 4 Leon. 248. Again, every word in an instrument ought, if possible, to operate, and subsequent words shall not defeat prior ones, if they may stand together. Hard. 94; 6 Mod. 107. Still, if there be words repugnant and plainly at variance with the general intention of the instrument, they shall be rejected: *Crowley* v. *Swindles*, Vaugh. 173; *Sims* v. *Doughty*, 5 Ves. 243; and if two clauses be plainly at variance, the former stands: Hard. 94; 6 Mod. 107; Shep. Touch. 88; 2 Taunt. 113; though it is otherwise in wills. *Doe* v. *Biggs*, 2 Taunt. 109; *Sherritt* v. *Buckley*, 2 My. & K. 149, so in an Act of Parliament, *Att. Gen.* v. *Chelsea W. W.*, 1 Fitzg. 195. If, however, the contradictions be of such a description as to render the intention of the instrument wholly uncertain and insensible, it will be void. 2 And. 103; 1 Inst. 20 b. *Thomas* v. *Thomas*, 6 T. R. 676.

A party cannot, without the very strongest evidence, be supposed to intend to contravene the rules of law, or to create a forfeiture, and therefore if either of those consequences would follow from giving a particular construction to the instrument, such a construction shall, if possible, be rejected. Co. Litt. 42 and 183; 2 Bl. Com. 379; Shep. Touch. 88.

Ancient instruments may be construed by ancient usage, for so the parties to them must be supposed to have intended. *Contemporanea expositio fortissima est in lege, per* Lord *Hardwicke*, 3 Atk. 577; see Bro. Abr. *Grants*, 89; 2 Bulst. 298.

An evident omission or mistake may be supplied even at law. *Trethewy* v. *Ellesdon*, 2 Vent. 141; *Lloyd* v. *Say and Sele*, 4 Bro. P. C. 73; see *Clinton* v. *Cholmondeley*, 2 B. & A. 625; *Spyve* v. *Topham*, 5 East, 115. As to the power of equity to rectify instruments, see *Uvedale* v. *Halfpenny*, 2 P. Wms. 151; *Tragus* v. *Puget*, 2 Ves. 194.

The words used in a deed are to be taken most strongly *against* the party using them, *verba accipiuntur fortius contra proferentem;* for the law supposes that natural self-love will prevent a man from unnecessarily using language to his own disadvantage. Co. Litt. 185; Cro. Car. 400; 2 Bl. Com. 379. But this is only to be carried as far as fair inference will allow; see 3 Ves. 48; and being a harsh rule, it must not be resorted to till other modes of exposition have been tried and failed. 2 Bl. Com. *ubi supra*, Bac. El. Reg. 3. And there is a difference in this respect between a deed poll and an indenture, the former being executed by the grantor alone, the words are his only; the latter being executed by both parties, the words are used by both. Plowd. 134.

It has been already said, "that where a deed may operate in two ways, he to whom it is made may elect in which way he will have it operate." But the instrument ought, if pleaded, to be stated according to its legal effect, and the court not left to make the election. In *Miller* v. *Green*, 2 Tyrwh. 8, 1 C. & J. 142, 8 Bing. 92, an action of replevin having been brought by the plaintiff against the defendant, the latter made cognizance, that, by deed of 25 Sept. 1806, Taylor granted Hodgson a rent-charge on the premises, with power to enter and distrain for the arrears and the distress to detain, manage, sell, and dispose of in the same manner in all respects as distresses for rent reserved on leases for years; and that he, the defendant, as bailiff to Taylor, entered and distrained for arrears thereof. The plaintiff pleaded in bar, that by a previous deed of 7th May, 1806, Taylor granted Walton a rent-charge out of the same premises, and for better securing the payment, granted, sold and demised them to Fletcher for ninety-nine years, with power of distress, and that arrears had accrued and were due. It was held that as the plea in bar did not aver an entry by Fletcher under the deed of 7th May, 1806, no estate at common law appeared to have vested in him by that deed; and that, though an estate might have passed to him by way of bargain and sale, under the Statute of Uses, still, as he had not so pleaded it, the court could not make the election for him. It is true that in this case the party pleading the deed was (as far as appeared on the record) a stranger,

and so the court observed. In *Pascoe* v. *Pascoe*, 3 Bingh. N. C. 898, the plaintiff having brought replevin, the defendant avowed that the plaintiff held the premises as his tenant under a demise, at a rent of 32*l.* per annum, and avowed for 80*l.* arrears: plea in bar, that the demise passed the whole of the defendant's interest, without leaving him any reversion. Upon demurrer, at a subsequent stage of the pleadings, it was held that the plea in bar was not bad; for that, on the authority of *Preece* v. *Corrie*, 5 Bingh. 24, it might admit a demise, yet set up an assignment; and though it was contended, on the part of the defendant, that the rent would, at all events, be a rent-seck, to which a power of distress would be incident by virtue of 4 G. 2, cap. 28, yet the court said, "Although it is true that this rent may be a rent-seck, and that the remedy is the same under the statute for a rent-seck as a rent-service, *yet the avowry is for a rent-service at common law, and not for a rent-seck.*" See further, as to the necessity of pleading a deed according to its legal effect, the excellent note to *Chester* v. *Willan*, 2 Wms. Saund. 97 b.

MERRYWEATHER *v.* NIXAN.

EASTER, 39 *G.* 3.—*K. B.*

[REPORTED 8 T. R., 186.]

If A. recover in tort *against two defendants, and levy the whole damages on one, that one cannot recover a moiety against the other for his contribution;* aliter, *in* assumpsit.

ONE Starkey brought an action on the case against the present plaintiff and defendant for an injury done by them to his reversionary estate in a mill, in which was included a count in trover, for the machinery belonging to the mill; and having recovered 840*l.*, he levied the whole on the present plaintiff, who thereupon brought this action against the defendant for a contribution of a moiety, as for so much money paid to his use.

At the trial, before Mr. Baron *Thomson*, at the last York assizes, the plaintiff was nonsuited, the learned judge being of opinion that no contribution could by law be claimed as between joint wrong-doers; and, consequently, this action, upon an implied *assumpsit*, could not be maintained on the mere ground that the plaintiff had alone paid the money which had been recovered against him and the other defendant in that action.

Chambre now moved to set aside the nonsuit; contending, that as the former plaintiff had recovered against both these parties, both of them ought to contribute to pay the damages: but

Lord *Kenyon*, C. J., said, there could be no doubt but that the nonsuit was proper: that he had never before heard of such an action having been brought, where the former recovery was for a *tort*: that the distinction was clear between this case and that of a joint judgment against several defendants in an action of *assumpsit*: and that this

decision would not affect cases of indemnity, where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right.

Rule refused.

The case of *Philips* v. *Biggs*, Hard. 164, was mentioned by *Law*, for the defendant, as the only case to be found in the books in which the point had been raised; but it did not appear what was ultimately done upon it.

THE principle established by *Merryweather* v. *Nixan*, viz., that one *tort-feasor* cannot recover contribution against another, is but one modification of that general rule laid down by *Wilmot*, C. J., in *Collins* v. *Blantern*, *ante*, vol. 1., viz. : *Ex turpi causâ non oritur actio.* "Whoever," his lordship there lays down, "is a party to an unlawful contract, if he have once paid the money stipulated to be paid in pursuance thereof, shall not have the help of a court of justice to fetch it back again." And the statement of an account in which the money due by the terms of the illegal contract is allowed, seems for this purpose equivalent to payment of it. *Owens* v. *Denton*, 1 C. Mee. & Rosc., 712; 5 Tyrwh. 359. In that case, the defendant had sold malt to the plaintiff by the hobbett, and the price having been included in an account stated and settled between them, it was held, that the defendant might avail himself of the sale in support of a plea of set-off to an action brought against him by the plaintiff. "The general proposition," said Lord *Abinger*, "may be admitted, that a seller cannot enforce a contract of this sort by action, or in support of a plea of set-off. But the question here is, whether a settlement of accounts, equivalent to a payment in cash, has not taken place between the parties?"

Examples of the rule, that money paid in pursuance of an illegal contract, shall not be brought back again, are to be found in B. N. P. 16, 132; *Howson* v. *Hancock*, 8 T. R., 575; *Browning* v. *Morris*, Cowp. 790; *Andrée* v. *Fletcher*, 3 T. R., 266; *Vandyck* v. *Hewitt*, 1 East, 97; *Lubbock* v. *Potts*, 4 East, 449; which shew, that, in case of illegal insurance, the premium cannot be recovered back, notwithstanding that, the insurance being void, the underwriters could not have been compelled to pay the loss; though it is otherwise where the illegality has been occasioned by an accident, of which the insured could not have been aware, such as the breaking out of hostilities between the country of the insured and this country, of which no news had arrived at the place where the insurance was effected. *Oom* v. *Bruce*, 12 East, 225; and see *Hentig* v. *Stanniforth*, 5 M. & S., 122. It must be observed that the generality of this doctrine is subject to some qualifications, for, though, generally speaking, money paid in pursuance of an illegal contract cannot be recovered, yet where the contract has been rendered illegal by an act the object of which is to protect one class of men against another, or where the contract has been made in consequence of oppression on one side, and submission on the other, persons belonging to the class whose protection is the object of the law, may recover back from those against whom it is intended to protect them, payments made under such a contract; see *Smith* v. *Bromley*, Dougl. 696 n., B. N. P. 133; *Jaques* v. *Golightly*, 2 Bl. 1073; *Jaques* v. *Withy*, 1 H. Bl. 65; *Williams* v. *Hedley*, 8 East, 378; *Taylor* v. *Lendey*, 9 East, 49; *Smith* v. *Cuff*, 6 M. & S. 160. And it must also be observed, that even money paid in pursuance of an illegal contract by one of the parties to it, but paid, not to the other party, but to a stakeholder, may be recovered back from the stakeholder before it had reached the other party's hands; for to permit this is merely to allow a *locus pœnitentiæ*, and to prevent the illegal contract from being

executed at all. See *Cotton* v. *Thurland*, 5 T. R. 405 ; *Smith* v. *Bickmore*, 4 Taunt. 474 ; *Hastelow* v. *Jackson*, 8 B. & C. 221 ; *Hodson* v. *Terrill*, 1 C. & Mee, 802.

The doctrine established in *Merryweather* v. *Nixan*, is drawn from the same source as that which prevents the recovery of money paid in pursuance of an illegal contract. If contributions could be claimed by one tort-feasor from another, the community of wrong between the plaintiff and defendant would be the very foundation of the action ; and it is as contrary to policy to allow a man to recover that which he has paid in consequence of his illegal *act*, as to allow him to recover that which he has paid in consequence of his illegal *contract* ; and therefore, where a sheriff lets the defendant go without taking a bail-bond, and is in consequence obliged to pay the debt, he cannot recover the amount of it from the defendant. *Pitcher* v. *Bailey*, 8 East, 171 ; *Eyles* v. *Faikney*, Peake N. P. C., 144 n. The qualifications which have been engrafted on the general rule laid down in *Merryweather* v. *Nixan*, will be found collected in the note to *Lampleigh* v. *Braithwaite*, *ante*, vol. 1, p. 71, in which the right of a joint-contractor to contribution is also spoken of.

VICARS *v.* WILCOCKS.

MICH.—47 *GEO.*, 3 *K. B.*

[REPORTED 8 EAST, 1.]

Where special damage is necessary to sustain an action for slander, it is not sufficient to prove a mere wrongful act of a third person induced by the slander, such as that he dismissed the plaintiff from his employ, before the end of the term for which they had contracted; but the special damage must be a legal and natural consequence of the slander.

Damage, to be actionable, must not be too remote.

IN an action on the case for slander, the plaintiff declared, that whereas he was retained and employed by one J. O., as a journeyman for wages, the defendant knowing the premises, and maliciously intending to injure him, and to cause it to believed by J. O. and others, that the plaintiff had been guilty of unlawfully cutting the cordage of the defendant, and to prevent the plaintiff from continuing in the service and employ of J. O., and to cause him to be dismissed therefrom, and to impoverish him; in a discourse with one J. M. concerning the plaintiff, and concerning certain flocking-cord of the defendant alleged to have been before then cut, said that he (the defendant) had last night some flocking cord cut into six yard lengths, but he knew who did it; for it was William Vicars; meaning that the plaintiff had unlawfully cut the said cord. And so it stated other like discourse *with other third persons*, imputing to the plaintiff that he had maliciously cut the defendant's cordage in his rope-yard. By reason whereof the said J. O., believing the plaintiff to have been guilty of unlawfully cutting the said flocking cord, &c., discharged him from his service and employment, and has always since refused to employ him; and also one R. P., to whom the plaintiff

applied to be employed after his discharge from J. O., on account of the speaking and publishing the said slanderous words, and on no other account whatsoever, refused to receive the plaintiff into his service. And by reason of the premises the plaintiff has been and still is out of employ and damnified, &c.

It appeared at the trial before *Lawrence*, J., at Stafford, that the plaintiff had been retained by J. O. as a journeyman for a year, at certain wages, and that before the expiration of the year his master had discharged him in consequence of the words spoken by the defendant. That the plaintiff afterwards applied to R. P. for employment, who refused to employ him, in consequence of the words, *and because his former master had discharged him for the offence imputed to him.* The plaintiff was thereupon nonsuited; it being admitted that the words in themselves were not actionable without special damage; and the learned judge being of opinion, that the plaintiff having been retained by his master under a contract for a certain time then unexpired, it was not competent for the master to discharge him on account of the words spoken; but it was a mere wrongful act of the master, for which he was answerable in damages to the plaintiff: that the supposed special damage was the loss of those advantages which the plaintiff was entitled to under his contract with his master; which he could not in law be considered as having lost, as he still had a right to claim them of his master, who, without a sufficient cause, had refused to continue the plaintiff in his service. 2dly, With respect to the subsequent refusal of R. P. to employ the plaintiff, that it did not appear to be merely on account of the words spoken: but rather on account of his former master having discharged him in consequence of the accusation; without which he might not have regarded the words.

Jervis now moved to set aside the nonsuit, and urged that it was always deemed sufficient proof of special damage in these cases, to shew that the injury arose in fact from the slander of the defendant, and it was not less a consequence of it because the act so induced was wrongful on the part of the master. He said, that he could find no case where such a distinction was laid down, and that the practice of Nisi Prius was understood to be otherwise. 2dly, That the refusal of R. P. to employ the plaintiff, was clear of

that objection; and that such refusal had proceeded upon the alleged cause of discharge by the first master, and not upon the bare act itself of discharge.

Lord *Ellenborough*, C. J., said, that the special damage must be the legal and natural consequence of the words spoken, otherwise it did not sustain the declaration: and here it was an illegal consequence; a mere wrongful act of the master; for which the defendant was no more answerable, than if, in consequence of the words, other persons had afterwards assembled and seized the plaintiff, and thrown him into a horsepond by way of punishment for his supposed transgression. And his Lordship asked whether any case could be mentioned of an action of this sort sustained by proof only of an injury sustained by the tortious act of a third person. Upon the second ground, *non liquet* that the refusal by R. P. to employ the plaintiff, was in consequence of the words spoken, as it is alleged to be: there was at least a concurrent cause, the act of his former master in refusing to continue him in his employ: which was more likely to weigh with R. P. than the mere words themselves of the defendant.

The other Judges concurring,

Rule refused.

In Comyn's Di. *Action on the Case—Defamation*, the doctrine here asserted namely, that damage, under certain circumstances may be too *remote* to form the subject-matter of an action, will be found laid down; and there are several modern cases in which the courts have acted upon it. In *Kelly* v. *Partington*, 5 B. & Ad. 645, the plaintiff, a servant maid, sued the defendant for using certain words not actionable in themselves, but, in consequence of which, it was stated, one Stenning had refused to engage her in his service. The court, however, held the action not to be maintainable, apparently, upon the ground that the words were not of a description which would *naturally* lead to the result stated by the declaration to have been produced by them. "I have always," said *Patteson*, J., "understood *that the special damage must be the natural result of the thing done.* The words here are, 'the plaintiff secreted 1*s.* 6*d.* under the till, stating, these are not times to be robbed.' Then, it is said, the words are actionable, because a person, after hearing them, chose in his caprice to reject the plaintiff as a servant. But, if the matter was not defamatory, the rejection of the plaintiff cannot be considered *the natural result* of speaking the words. To make the speaking of the words wrongful, they must, in their nature, be defamatory."

In *Morris* v. *Langdale*, 2 B. & P. 284, the declaration stated that the plaintiff was a dealer in the funds, and that the defendant said of him, "*He is a lame duck*," meaning that he was incapable of fulfilling his contracts, in consequence of which divers persons refused to deal with him. The court held the declaration bad upon the ground that the plaintiff's contracts, which the words *lame duck* accused him

of not fulfilling, might be unlawful ones, and if so, no special damage could arise from a charge that he had not done that which the law prohibits.

In *Ashley* v. *Harrison*, 1 Esp. 48, the declaration stated that the defendant had published a libel on Madame Mara, in consequence of which she refused to sing (as she had engaged to do) at his oratorio, from an apprehension of being hissed and ill-treated, whereby he lost the benefit of her services. Lord *Kenyon* held the action not maintainable. "The injury," he said, "was *too remote*, and impossible to be connected with the cause assigned for it. Her refusal to perform might have proceeded from groundless apprehension; and the plaintiff was not at liberty to suggest the libel as the cause of that injury, which might have proceeded from another cause, or perhaps from caprice or insolence.'"

In *Ward* v. *Weeks*, 7 Bingh. 211, the declaration stated the defendant to have said of the plaintiff, "He is a rogue and a swindler; I know enough about him to hang him," in consequence of which John Bryer refused to sell the plaintiff certain goods. It turned out at the trial that the words were spoken to Bryce, and communicated by him to Bryer, who thereupon refused to trust the plaintiff: upon this the plaintiff was nonsuited. On a motion to set aside the nonsuit, it was urged that Bryce was the mere conduit-pipe of the slander; but the court thought that Bryce, being a free agent, his repetition of the defamatory words to Bryer was a wrongful act, for which he, and not the defendant, should be answerable, and they discharged the rule. "Every man," said *Tindal*, C. J., "must be taken to be answerable for the necessary consequences of his own wrongful acts. But such a spontaneous and unauthorised communication cannot be considered the necessary consequence of the original uttering of the words; for no effect whatever followed from the first speaking of the word to Bryce: if he had kept them to himself, Bryer would still have trusted the plaintiff. It was the repetition of them by Bryce to Bryer, which was the voluntary act of a free agent, over whom the defendant had no control, and for whose acts he is not answerable, that was the immediate cause of the plaintiff's damage. We think, therefore, that as each count in the declaration alleges, as the only ground, the original false speaking of the words, the allegation that 'by means of the committing of such grievance, Bryer refused to give the plaintiff credit,' is not made out by the evidence, and on that ground we think the nonsuit is right."

For instances in which the argument, that the damage assigned was too remote, has been held unavailable, may be cited *Knight* v. *Gibbs*, 1 Ad. & Ell. 43, and *Green* v. *Button*, 2 C. M. & Rosc, 707. In *Knight* v. *Gibbs*, the declaration stated that the defendant spoke certain words of the plaintiff, in consequence of which she was obliged to leave the service of Samuel Enock, a finisher of straw hats, by whom she was employed. The evidence was, that the defendant came to Mrs. Enock, and said to her of the plaintiff and her fellow-lodger, "I am ashamed of their conduct; they were singing and making a noise, and tabouring the windows: it is no use their denying it. Their conduct is shameful and disgraceful, more like a bawdy-house than anything; and no moral person would like to have such people in the house." Mrs. Enock, after this, dismissed the plaintiff and her companion; but said she did so, not because she believed what the defendant said, but because he was her landlord, and she was afraid of offending him. After a verdict for the plaintiff, a motion was unsuccessfully made to enter a nonsuit, on the ground that the damage did not flow from the imputation, but from Enock's wish to oblige the defendant, which would have produced the same effect had the words contained no imputation, but merely expressed his desire of the plaintiff's dismissal. "The case," said *Patteson*, J., "was not like *Vicars* v. *Wilcocks*, because here the whole cause of the special damage proceeds from the plaintiff himself; nothing is done by any other person." "It is clear," said *Parke*, J., "that if the words in question had not been used, the plaintiff would not have been dismissed; and it is sufficient in this action to show she was turned out in consequence of such words

of the defendant. The effect of the evidence may be, that the witness would have turned the plaintiff away if different words had been used; but the different words were not used, and she was sent away in consequence of these. In *Vicars* v. *Wilcocks*, supposing the point there to have been rightly decided, there were two distinct causes of the special damage; the words used, and the act done by a third person; and the special damage might have resulted from either."

In *Green* v. *Button*, 2 C. Mee. & R, 707, the declaration stated that the plaintiff was a carpenter, and had purchased of C. & Son 200 battens for 11*l.* which he had borrowed from the defendant and paid to C. & Son; for which the defendant falsely and wrongfully pretending that he had a *lien* on the battens, directed C. & Son not to deliver them to the plaintiff without his (the defendant's) orders; that C. & Son complied with this direction, and plaintiff thereby lost the benefit of the battens. The plea denied the payment of the 11*l.* to C. & Son; and, on demurrer to it, the declaration was impugned on the authority of *Vicars* v. *Wilcocks*, and *Morris* v. *Langdale*. The court, however, held, that if C. & Son had not been paid (and the plea traversed the payment), it was not clear that their refusal to deliver the battens was unjustifiable, and if not, it might be assigned as special damage arising from the defendant's false representation, without impugning the authority of *Vicars* v. *Wilcocks*. *Parke*, B., in delivering judgment, said, "*Vicars* v. *Wilcocks*, and Lord *Eldon's dictum* in *Morris* v. *Langdale*, are cited to show that the plaintiff's right of action against them (C. & Son), bars him from recovering against the defendant: it is not necessary to consider how far those cases would be supported, if the same question arose directly; if it did, we should desire time to give them a full consideration, some doubt having been thrown upon their authority."

The work to which his lordship alluded, as having cast some doubt on the authority of *Vicars* v. *Wilcocks*, is Mr. Starkie's excellent Law of *Slander and Libel*, 2 Ed. p. 205, where the following observations will be found:—"It has been said, that where, in consequence of the words, a third person has refused to perform a contract previously made with the plaintiff, and which he is in law bound to perform, no action is maintainable, for the plaintiff is, in such case, entitled to a compensation for the nonperformance of the contract; and were he allowed to maintain his action for the slander, he would receive a double compensation for the same injury—first, against the author of the slander; and secondly, against the person who had refused to perform his agreement. This doctrine would, in many instances, be productive of hardship to the plaintiff: he may revert, it is true, to his legal remedy against the person refusing to perform his contract; but this can scarcely be considered as a full and real compensation to a party who has had a benefit in possession wrested from him, and converted into a bare legal right." It may perhaps be urged that *Vicars* v. *Wilcocks* was decided, not so much on the ground that the plaintiff, if suffered to recover, would have obtained two compensations, as on the ground that the damage alleged by the plaintiff could not be considered the *natural* consequence of the defendant's act, since the law cannot esteem it natural that the repetition of a slander against the contractor should induce any one to break his contract. Still it is difficult to answer the observation made by Mr. Starkie, in a note to the above passage, namely, that the doctrine laid down in *Vicars* v. *Wilcocks* is inconsistent with the cases in which an action has been maintained for slander laying, as special damage, the loss of a marriage by a lady, to whom the party breaking off the match was under an engagement, and with the case of *Newman* v. *Zachary*, cited in the same note from Aleyn 3, where an action *on the case* was maintained, for wrongfully representing to the bailiff of the manor, that a sheep was an estray, in consequence of which, it was wrongfully seized. Perhaps the true ground on which *Vicars* v. *Wilcocks* may be supported is, that there was, in reason and common sense, no connection between the imputation levelled at the plaintiff, and the damage said to have been the result of it, any more than in *Kelly* v. *Partington*, the rejection

of the plaintiff as a servant could be considered the natural consequence of the words spoken of her by the defendant. That case shows, that the words for which an action is maintainable must have, in common sense and reason, some connection with the damage said to have ensued from them; and that it is not enough that the unwarrantable caprice of some person has caused a damage to result from them, which the speaker had no reason to apprehend.

But besides that, *Vicars* v. *Wilcocks* may be supported on the ground taken by the court in *Ward* v. *Weeks;* for the imputation was not uttered in a discourse either with J. O. or R. P., but in discourse with third parties who were free agents; and, had not those third parties repeated it, the mischief never would have ensued; just as in *Ward* v. *Weeks,* the damage was attributable, not to the defendant's discourse with Bryce, but to Bryce's repetition of it to Bryer.

ADDENDA.

Page 10, line 31, second column, add—*Dalman* v. *King*, 4 Bing. N. C. 105; *Gowar* v. *Von Dedalzen*, 3 Bing. N. C. 717; *Lucas* v. *Godwin*, *ibid.* 737.

„ 11, „ 7, first column, add—See *Jackson* v. *Jacob*, 3 Bing. N. C. 868.

„ 12, „ 1, first column, add—*Thurnell* v. *Balbirnie*, 2 Mee and Welsb. 786.

„ 15, „ 46, first column, add—*Vide tamen* the distinction taken in *Young* v. *Cole*, 3 Bing. N. C. 724.

„ 38, *ad finem*, add—"and a plea in justification is sufficient if it justify the substantial charge, though it may not in terms aver the truth of every reproachful word used by the defendant. *Morrison* v. *Harmer*, 3 Bingh. N. C. 759.

„ 51, column 2, line 20, after 1 T. R. 163, add—*Doe* d. *Bath* v. *Clarke*, 3 Bing. N. C. 429.

„ 54, *ad finem*, add—*The Bailiffs of Godmanchester* v. *Phillips*, 4 Ad. & Ell. 575.

„ 120, at the end of column 1, add—*Mackintosh* v. *Trotter*, 3 Mee and Welsb. 184.

„ 170, column 2, line 3, add—accord, *Yates* v. *Whyte*, 4 Bing. N. C. 272.

NEPEAN *v.* DOE.

TRIN. 7 W. 4.—IN CAM. SCACC.

[REPORTED 2 M. & W. 910.]

Adverse Possession since Stat. 3 & 4 W. 4, c. 27.

THIS was an ejectment, commenced in Hilary Term, 1834, to recover possession of copyhold premises in the parish of Loders, in the county of Dorset (being the same premises claimed in the cause of *Doe* d. *Knight* v. *Nepean* (*a*)), and was tried before *Patteson*, J., at the Dorsetshire Spring Assizes 1835, when the following evidence was given on the part of the plaintiff:—

(*a*) 5 B & Ad. 86; S. C. nomine *Doe* d. *Slade* v. *Nepean*, 2 Nev. & M. 219.

2d January 1788.—At a Court held this day for the manor of Loders, Matthew Knight took of the lord certain copyhold tenements called the Roofless Living and Home Living, (being part of the premises in question in this cause,) to hold to him the said Matthew Knight and Edward Knight (his brother), and Elizabeth Mary Davies, for their lives, and for the life of the longest liver of them, successively.

16th October 1794.—At a Court held this day, the said Matthew Knight took of the lord a certain copyhold tenement called Mabys Hay, (being other part of the premises in question,) to hold to him the said Matthew Knight and Rice Davies Knight his son, for their lives, and the life of the longest liver of them, successively, in reversion immediately after the determination of the estate of Henry Budden therein.

20th March 1797.—At a Court held this day, George Bagster and Nathaniel Taylor, as assignees of the said Matthew Knight, a bankrupt, were admitted tenants to the said tenements called Roofless Living, Home Living, and Mabys Hay, except out of the latter as to one close called Sheep Acres, to which they were admitted tenants in reversion of the said Henry Budden.

At the same Court, George Knight took of the lord the reversion of the said tenements called Roofless Living and Home Living, to hold to Paul Slade Knight (the lessor of the plaintiff) and Thomas Clothier Knight, sons of the said George Knight, for their lives, and the life of the longest liver of them, successively, after the determination of the estate and interest which the said George Knight claimed to have for the life of the said Matthew Knight his brother.

And, at the same Court, there was entered a letter of attorney, dated 13th March 1797, whereby the said George Bagster and Nathaniel Taylor appointed Richard Travers their attorney, to take admittance of the said tenements called Roofless Living, Home Living, and Mabys Hay, together with the said close called Sheep Acres, and to surrender the same to the use of the said George Knight, his executors, administrators, and assigns, for the life of the said Matthew Knight.

In August, 1806, Thomas Clothier Knight died. In December in the same year, or early in 1807, Matthew Knight went to America; and in the month of May, 1807, a letter was received from him, but he was never heard of afterwards.

Matthew Knight was in possession of the premises in question for the three years preceding his bankruptcy, which happened in 1797; and after that event George Knight entered into possession of the same premises as the purchaser of Matthew Knight's interest, and continued in such possession till his death; but he was never actually admitted tenant to the lord.

On the 1st of August, 1807, George Knight executed an indenture of mortgage to the said Richard Travers, of all the said premises, for the term of seventy years, if the said Matthew Knight should so long live, for securing the payment of two several sums of 838*l.* and 375*l.* Soon after the date of this mortgage, all the premises were sold to Sir Evan

Nepean, the father of the defendant in this action (the plaintiff in error), but the purchaser was never admitted tenant to the lord; and if any formal conveyance was executed, it had been lost.

On the 12th December, 1807, George Knight died.

On the 6th April, 1808, Sir Evan Nepean granted a lease of the premises to the said Richard Travers for the term of fourteen years from this date, and Travers underlet the premises to George Way, who occupied them from the death of the said George Knight in 1807, to the death of Travers in 1813. Shortly after Travers's death, the premises were surrendered by his executors to Sir Evan Nepean, who continued in possession thereof by himself for his tenants, from thence until his death in 1822: and from that time to the present, the defendant, Sir Molyneux Nepean, has been in the possession thereof.

Upon these facts, two questions were raised at the trial: first, whether it was incumbent on the lessor of the plaintiff to prove that the said Matthew Knight was actually alive within twenty years next before the commencement of the action; secondly, whether it appeared upon the evidence that there had been an adverse possession of the premises against the lessor of the plaintiff, for twenty years before the action brought. The learned judge stated his opinion to the jury as to the first point, that it was incumbent on the lessor of the plaintiff to prove that Matthew Knight was actually alive within twenty years, and that he had not proved it; and as to the second point, that if Sir Evan Nepean took as purchaser of the interest of George Knight, then his possession had not been adverse for twenty years, because it could not be adverse so long as it was uncertain whether Matthew Knight was alive or dead, which it was up to May 1814. The jury found that Matthew Knight was not proved to have been actually alive within twenty years next before the commencement of the action, but that it did not appear by the evidence that there had been an adverse possession of twenty years as against the lessor of the plaintiff; and the verdict was thereupon entered for the plaintiff.

The lessor of the plaintiff excepted to the opinion of the learned judge on the first point, and the defendant to his opinion on the second point, and cross bills of excep-

tions were tendered and sealed accordingly, and writs of error sued out thereon. The case was argued in last Michaelmas by

Sir *W. W. Follett*, for the plaintiff in error.—The lessor of the plaintiff, in order to sustain the action, was bound to prove both his right of property in the premises, and his right of entry. To make out these, it became incumbent on him to show—first, that Matthew Knight was dead; and, secondly, that the title fell on him in remainder within twenty years before the commencement of the action: therefore he was bound to prove the death of Matthew Knight within twenty years before action brought. It was contended for the lessor of the plaintiff, that, by analogy to the statute against bigamy, 1 Jac. 1, c. 11, s. 2, and the statute 19 Car. 2, c. 6, as to estates *pur autre vie*, the presumption of the death of Matthew Knight did not raise until the expiration of seven years after he was last heard of: in other words, that he must be presumed to have lived to the end of those seven years. This is in effect, as to this point, a writ of error from the judgment of the Court of King's Bench (*a*), which decided that there was no legal presumption at all as to the *time* of his death. It is not necessary, therefore, to refer again to the authorities cited on that occasion; but a case has been since decided, in which the same doctrine was re-stated. In *Rex* v. *Inhabitants of Harborne* (*b*), on an appeal against an order of removal of a female pauper, the respondents having proved her settlement by marriage, the appellants showed that the husband had been previously married, and that a letter had been written by his first wife, bearing date twenty-five days before the second marriage, from Van Diemen's Land. The Sessions having on this evidence quashed the order of removal, the Court of King's Bench held that they were warranted in so doing, for they might presume that the first wife was living at the time of the second marriage. *Rex* v. *Twyning* (*c*), had been cited as an authority to the contrary. Lord *Denman*, C. J., says (*d*): I must take this opportunity of saying, that nothing can be more absurd than the notion that there is to be any rigid presumption of law on such questions of fact, without reference to accompanying circumstances; such, for instance, as the age or health of the party. There can be no such strict pre-

(*a*) 5 B. & Ad. 93; 2 Nev. & M. 225.

(*b*) 2 Ad. & E. 540; 4 Nev. & M. 341.

(*c*) 2 B. & Ald. 386.

(*d*) 2 Ad. & E. 544.

sumption of law. In *Doe* d. *Knight* v. *Nepean*, the question arose much as in *Rex* v. *Twyning*. The claimant was not barred, if the party was presumed not dead till the expiration of the seven years from the last intelligence. The learned judge who tried the cause held that there was a legal presumption of life until that time, and directed a verdict for the plaintiff; because, if there was a legal presumption, there was nothing to be submitted to the jury. But this Court held that no legal presumption existed, and set the verdict aside. . . . . I think the only questions in such cases are, what evidence is admissible, and what inference may fairly be drawn from it." There is another case, which was not referred to on the argument in the Court of King's Bench—*Patterson* v. *Black* (*a*). There, in an action on a policy of insurance on the life of one Macleane, from the 30th January 1772 to the 30th January 1778, it appeared in evidence, that about the 28th of November 1777, Macleane sailed from the Cape of Good Hope in the Swallow sloop of war, which, not being afterwards heard of, was supposed to have been lost in a storm off the Western Islands. In order to prove the death of Macleane before the 30th of January 1778 the plaintiff called witnesses to prove the ship's departure from the Cape, and several captains swore that they sailed the same day; that the Swallow must have been as forward in her course as they were on the 13th or 14th of January, when they encountered a most violent storm; and that she was much smaller than their vessels, which weathered it with difficulty. Lord *Mansfield* left it to the jury to say, whether, *under all the circumstances*, they thought the evidence sufficient to convince them that the party died before the expiration of the time limited in the policy; adding, that if they thought it so doubtful as not to be able to form an opinion, the defendant ought to have their verdict. There would be many cases in which such a presumption as that which is contended for would materially affect the title to land, and would yet be altogether contrary to the fact. The Courts have therefore invariably said, that there is no presumption as to the *time*, although there is as to the *fact*, of the death. Here no *evidence* whatever was given to show the time of the death.

(*a*) Park Ins. 644.

But it is said, and the learned judge so expressed his

opinion, that, as Sir Evan Nepean took as purchaser from George Knight, his possession was not adverse so long as it was uncertain whether Matthew Knight was alive or dead; that is, not until the end of the seven years. But the *certainty* of his death does not exist even now, although the Courts may presume it if legal proceedings are taken. The presumption then made is this, and no more,—that he died *at some time* within the first seven years, during which he has not been heard of. It is altogether immaterial, that Sir Evan Nepean's possession was not adverse to Matthew Knight, the tenant for life; the moment he died, the possession became adverse to his remainderman. The right of entry accrues to the remainderman, under such circumstances, as soon as he has a right to treat the party in possession as a trespasser—that is, immediately on the death of the tenant for life. The question is, therefore, identical with the former—when, namely, did the death of the tenant for life occur? The statutes of limitations themselves contain no reference to the doctrine of adverse possession, which has been engrafted by the Courts upon the statute 21 Jac. 1, c. 16. That statute simply enacts, "that no person or persons shall make *any entry* into any lands, &c., but *within twenty years next after his or their title, which shall first descend or accrue to the same,* and in default thereof such persons so not entering, and their heirs, shall be utterly excluded and disabled from *such entry* after to be made." In the case, then, of the tenancy of a particular estate, with an estate of remainder, when does the remainderman's title accrue to him? Undoubtedly at the death of the tenant of the particular estate. Suppose Matthew Knight died in 1808, had not the remainderman full right then to enter? The question is not whether the remainderman acquiesced in a continuance of the possession under the tenant for life; that would be a question for the jury. The recent act for the limitation of actions, 3 & 4 Will. 4, c. 27, does not alter the case. The second section enacts, that after the 31st December, 1833, "no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years *next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he*

claims; or if such right shall not have accrued to any person through whom he claims, then *within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same.*" And the 5th section declares, that when the estate or interest claimed shall have been an estate or interest in reversion or remainder, such right shall be deemed to have first accrued *at the time when it became an estate or interest in possession.* Here the right of entry accrued, and the estate vested in possession, on the death of the tenant for life. The whole case, therefore, resolves itself into the same question which was determined by the Court of King's Bench—when did that death happen? No doubt some acts of the party in remainder may prevent the possession under the tenant for life from being adverse to himself, as in the case of a void lease for years by the tenant for life, and receipt of rent under it by the remainderman: *Roe* d. *Brune* v. *Prideaux* (*a*), *Denn* v. *Rawlings* (*b*); and so of other acts showing a recognition of the continuance of possession; but if no such act be shown, the occupation is adverse from the death of the tenant for life. If the possession here was not adverse, Sir Evan Nepean was tenant to Paul Slade Knight, otherwise there has been a disseisin. If any such presumption could arise, it was for the jury; but it could not, because Sir Evan Nepean was clearly claiming in his own right, at all events from the death of Matthew Knight. The doctrine of adverse possession was adopted on the principle that the *right of entry did not accrue* until the occupation of the land became no longer permissive, as in the case of landlord and tenant, or of trustee and *cestui que trust.* So, in the case of a joint tenancy or tenancy in common; though each party has a right to come upon the land, he has no right of entry to make a demise to the exclusion of the other party. So also the mortgagor, being in possession with the consent of the mortgagee, in whom the legal estate is vested, is his tenant: *Partridge* v. *Bere* (*c*), *Hall* v. *Doe* d. *Surtees* (*d*). Here it is clear there was no occupation *by the consent* of the remainderman. In *Doe* d. *Parker* v. *Gregory* (*e*), where a widow, tenant for life of lands settled upon her by a deceased husband by way of jointure,

(*a*) 10 East, 158.
(*b*) Ibid. 261.

(*c*) 5 B. & Ald. 604.
(*d*) 5 B. & Ald. 687.
(*e*) 2 Ad. & E. 14; 4 Nev. & M. 306.

married again, and levied a fine of the lands jointly with her second husband, and died, and the husband held for more than twenty years after her death, it was held that his possession was adverse against the reversioner after her death, although he had originally come into possession lawfully, because he could have been treated as a trespasser immediately on the wife's death. Suppose it were necessary to plead the Statute of Limitations specially, what would the party have to prove under it?—*that his right of entry accrued within twenty years.* The question, therefore, whether the possession was adverse to the tenant for life or not, is immaterial; since the plaintiff's right of entry accrued, and his estate vested in possession, on the death of the tenant for life. If, on the other hand, the question as to adverse possession has reference to a possession adverse as against the remainderman only, that was a question for the jury; but there was no fact from which to infer that it was permissive.

The *Attorney-General*, contrà.—The consequence of determining both the points in this case against the lessor of the plaintiff will necessarily be, that his time for bringing an ejectment is abridged to thirteen years instead of twenty. He could not bring it until the end of seven years after May 1807: if he had laid his demise earlier than May 1814, he must have inevitably failed on this evidence, because the presumption of the *fact* of the death had not yet arisen. The plaintiff is, however, it is submitted, entitled to judgment on both points.

First, as to the question of adverse possession:—This case does not fall within the statute 3 & 4 Will. 4, c. 27. The enactments of that statute had for their object to get rid of the uncertainty as to the law of adverse possession, which formed so great an impediment in the tracing of titles. But the fifteenth section saved this case from the operation of the previous sections, giving the further period of five years, during which the doctrine of adverse possession was to remain as before. [*Patteson*, J.—That is, where the possession was not adverse at the passing of the act.] It is retrospective through the whole past period, and gives five years more for the purpose of bringing ejectment. Then, how did this case stand under the old law? Matthew Knight, the tenant for life, having become

bankrupt, his assignees convey his interest to George Knight; he mortgages to Travers, and Travers assigns his mortgage to Sir Evan Nepean, who becomes possessed of the equity of redemption as well as of the mortgage term. Sir Evan Nepean, therefore, represents George Knight, who represents Matthew. Then, with regard to the actual possession: George Knight occupied the premises till December 1807; Way (the tenant under Travers) succeeded, and held till 1814; then came in the tenant of Sir Evan Nepean. It might be contended that, at the time when the 3 & 4 Will. 4, c. 27, passed, there had been no adverse possession at all. Where the possession is at first lawful by the party's entering in his own right, it does not become unlawful by his continuance in possession, after the period when he is in possession by right. In *Doe* v. *Gregory*, the husband did not pretend to hold under his wife: he did not come in lawfully by right. [*Patteson*, J.—The whole of that case is, that there may be an unlawful possession which does not amount to a disseisin.] There must be an *ouster*, an intention to disseise, otherwise there is no disseisin; and it has been always held that the statute of 21 Jac. 1 does not begin to run until after an ouster or disseisin. The most familiar example is where there are two sons, and the younger enters and keeps possession; the statute does not run against the elder unless he is actually ousted or disseised; *Reading* v. *Royston* (*a*). In *Doe* d. *Burrell* v. *Perkins* (*b*), tenant for life leased for her life, and died in 1799, and the lessee continued in possession without payment of rent till his death in 1805, when his son took possession, and continued without payment of rent, and in 1807 levied a fine with proclamations; it was held that the remainderman in fee might maintain ejectment against him without an actual entry to avoid the fine, or a notice to determine the tenancy. Lord *Ellenborough* said, "In order to constitute a title by disseisin, there must be a wrongful entry; but here has been no wrongful entry, but only a wrongful continuance of the possession, therefore there was no disseisin." [*Patteson*, J.—The point of *adverse possession*, as distinguished from disseisin, did not arise there, because the ejectment was brought within twenty years of the death of the tenant for life.] But the doctrine laid down went to the extent that it might have been brought

(*a*) Salk. 423.

(*b*) 3 M. & Selw. 271.

even beyond the twenty years; the validity of the fine depended on the question, whether the possession was adverse or not; and it was held that neither by right nor by wrong the conusor had anything in the premises. The case is altogether at variance with the argument on the other side, that the Statute of Limitations always begins to run from the time when the original right of entry accrues. The same general doctrine, that where the original entry is lawful, the mere continuance of possession does not make it adverse, is laid down in many other cases: *Hall* v. *Doe d. Surtees* (*a*), *Doe* d. *Colclough* v. *Hulse* (*b*), *Doe* d. *Souter* v. *Hull* (*c*), *Doe* d. *Smith* v. *Pike* (*d*), *Doe* d. *Roffey* v. *Harbrow* (*e*). The case of *Doe* d. *Forster* v. *Scott* (*f*), which was cited at the trial as an authority the other way, turned merely on the construction of a grant of copyholds. On these authorities, if Sir Evan Nepean entered rightfully, as the purchaser of Matthew Knight's life estate, without any intention to disseise, his continuance in possession did not make the statute begin to run. There would be no pretence for considering George Knight's possession adverse, if he himself had held over; and all the others have come in under him. And if the possession of Sir Evan Nepean was the possession of Knight, it followed as a conclusion of law, that it was not a case of adverse possession, and there was nothing to be left to the jury. Nor *could* Sir Evan's possession be adverse, that is, as claiming by an adverse title, during the seven years while it was uncertain whether Matthew was dead. It is clear he believed him alive in 1808, when he was treating for his life interest; and it is equally clear he never set up any pretence to hold adversely to the remainderman.

(*a*) 5 B. & Ald. 687; 1 Dowl. & R. 340.
(*b*) 3 B. & Cr. 757; 5 Dowl. & R. 650.
(*c*) 2 Dowl. & R. 38.
(*d*) 3 B. & Ad. 738; 1 Nev. & M. 385.
(*e*) 3 Ad. & E. 68, n.; 1 Nev. & M. 422.
(*f*) 4 B. & Cr. 706; 7 D. & R. 190.

Secondly.—It is submitted that the ordinary presumption of law is, that a party lives *during* the period of seven years after he was last heard of. That presumption may be rebutted by circumstances—as by proof that the party was aged, or infirm, or exposed to extraordinary peril; and will subsist only in the absence of any circumstances to rebut it. Thus, in *Patterson* v. *Black*, there was a storm, and probable shipwreck. *Watson* v. *King* (*g*) is not in point, because Lord *Ellenborough* there proceeded on the rule adopted in insurance law, that a vessel proved to have sailed, and not to have been heard of for several

(*g*) 1 Stark, N. P. C. 121.

years, may be considered as lost; and there is no other decision to support the judgment of the Court of King's Bench in the present case. [*Vaughan*, B.—Is not the presumption rather that life endures through the seven years, than that it expires within the seven years, according to *Doe* d. *George* v. *Jesson* (*a*).] Lord *Ellenborough* there laid it down, that "the presumption of the duration of life, with respect to whom no account can be given, ends at the expiration of seven years from the time when they were last known to be living." It is most convenient that such a definite period should be fixed; it draws the line distinctly, and prevents confusion; and the analogy with the several statutes by which such a period is limited is then complete. *Against* the lessor of the plaintiff, the presumption is that Matthew Knight lived seven years from May 1807; *for* him, the presumption is that he lived no longer. If it be otherwise, this absurdity follows; if this ejectment had been brought within twenty years from May 1807, it is admitted it might have been sustained; but if it had been brought within *seven* years from that period, the plaintiff must have been nonsuited. The law presumes that the party lives seven years, therefore the action cannot be brought sooner: and that he died at the end of seven years, therefore it may be brought within twenty years after. The demise might be laid the very day after the expiration of the seven years, but not earlier. The question is, is not the same presumption to be made as to the limitation, as is made as to the commencement, of the action? [*Patteson*, J.—It does not appear to me to be a matter of *analogy* merely to the stat. of 19 Car. 2, c. 6; that seems to me to be the governing statute on this very subject.] That statute enacts, that where *cestui que vies* shall absent themselves by the space of *seven years together*, they shall be accounted as naturally dead—that is, at the expiration of the seven years. [*Coleridge*, J.—The preamble shows that the inconvenience to be remedied was only the inability to prove the death.] *Rex* v. *Inhabitants of Harborne* (*b*) is distinguishable; it only shows that the law will presume that life continues for twenty-five days. [*Patteson*, J. referred to *Rex* v. *Twyning* (*c*).] There there were conflicting presumptions; but the Court admitted the existence of the

(*a*) 6 East, 80.

(*b*) 2 Ad. & E. 540; 4 Nev. & M. 341.

(*c*) 2 B & Ald. 386.

presumption that life continues for seven years. The dicta of the judges, and the convenience of the case, are in favour of the decision now contended for; because otherwise the period of limitation will inevitably be abridged in all such cases to thirteen years; and what inconvenience is there, on the other hand, in holding that such a presumption shall stand until the contrary is proved? [Lord *Denman*, C. J.—Is it quite clear that the late statute does not apply?] It does not apply for two reasons: first, it is retrospective; secondly, this possession was not adverse. The right construction of s. 15 is, that five years are given if the party needs it. [*Patteson*, J.—The direction I meant to give was, that at all events the possession was not adverse until the presumption of the fact of death arose; I certainly should not have taken upon myself to decide, without leaving it to the jury, that there had been no adverse possession at all.]

The Court (Sir *W. Follett* not being present) called on

Barstow, in reply.—The argument on the other side ranges itself under two heads:—First, whether the onus of proving the time of the death lay on the lessor of the plaintiff; secondly, whether he has satisfied it or not. The test of the first point is, by supposing a plea putting in issue whether the plaintiff's right accrued within twenty years or not. He must prove all the facts which are necessary to make out his affirmative. At what point does the Attorney-General say the possession became wrongful? It must be so at the time of ejectment brought; but he says it was rightful at first. The argument goes to the extent that the possession has never been adverse at all; if so, the ejectment cannot be maintained at all. The cases cited on the other side are distinguishable. *Reading* v. *Royston* need not be disputed; because adverse possession for twenty years is evidence of an ouster or disseisin. In *Doe* v. *Perkins*, the fact of an *adverse possession* is not stated at all; the case did not turn on the Statute of Limitations, but on the effect of a fine, and no sufficient time had elapsed from which to infer a disseisin. The distinction was there taken between a disseisin and adverse possession. It may be that the defendant has no title; but the question also occurs, whether the plaintiff has a right to bring his action, not being barred by the lapse of time. *Hall* v. *Doe* d. *Sur-*

tees proceeded altogether on the peculiar condition of mortgagor and mortgagee, which is an anomalous case, and cannot aid the argument on any other question. In *Doe* d. *Colclough* v. *Hulse*, the sole consideration was, whether, under the circumstances, the possession was adverse until the death of a particular party, the ejectment being brought within twenty years after that event. Here it is agreed that the right dates from the death; but the difficulty is to fix the death. In *Doe* d. *Souter* v. *Hull*, all that the Court decided was, that under the circumstances it was a case of tenancy by sufferance, and not of adverse possession at all. So also in *Doe* d. *Roffey* v. *Harbrow*, the adverse possession was negatived by the particular facts of the case. But the present case *does* fall within the 3 & 4 Will. 4, c. 27, and is not within the exception in s. 15, which applies only where the possession was not previously adverse. And the plaintiff must prove positively that he is not barred by the lapse of time, and has no right, by a *primâ facie* case, to shift the onus to the other party.

With respect to the other question, there is no sufficient authority for the existence of the presumption that life endures for seven years. Even if the question be doubtful, the conclusion must be against the lessor of the plaintiff. In the cases referred to, relating to insurance, the precise *time* of the death was not material: if the action had been brought more than six years after the sailing of the ship, and there had been a plea of the Statute of Limitations, those cases would have been analogous. In *Doe* v. *Jesson*, it was put to the jury to fix the *time* as well as the fact of death, and they fixed it within a period which excluded the seven years, and answered the purposes of the cause. The whole question is, is there any *absolute presumption of law*—can it be stated as a legal proposition that the Court must, independently of particular circumstances, infer that life endures for the seven years, and then expires? The necessity for the statutes referred to shows that there was no such rule at common law; and the 19 Car. 2, c. 6, only supplies the proof of the *fact* of death.

Cur. adv. vult.

In Trinity Vacation, the judgment of the Court was delivered by

Lord *Denman*, C. J.—The lessor of the plaintiff claimed as grantee in reversion of a copyhold estate, on the death of Matthew Knight. Matthew Knight went to America in December 1806, or early in 1807, and the last account that was heard of him was by a letter written by him from Charleston, which was received in England in May 1807. The declaration in this cause was served on the 18th January 1834. At the trial, evidence was given to show that the defendant came into possession as a purchaser of the interest of George Knight, who held for the life of Matthew Knight.

Two questions arose. First, whether the lessor of the plaintiff was bound to give some evidence as to the precise time of Matthew Knight's death, in order to show that he had brought this action within twenty years of his death; or whether the presumption of his being alive continued to the last moment of the seven years since he was last heard of, when the law presumes that he was dead, and which *was* within twenty years next before the commencement of the action. Secondly, whether, on the supposition that the defendant came in as a purchaser of George Knight's interest, there had been twenty years' adverse possession as against the lessor of the plaintiff.

The learned judge told the jury it was incumbent on the lessor of the plaintiff to prove that Matthew Knight was actually alive within twenty years before the commencement of the action, and that he had not proved that fact by merely showing that seven years since he was last heard of expired within twenty years next before the commencement of the action; on which the counsel for the lessor of the plaintiff tendered a bill of exceptions. The learned judge also told the jury, that if they were of opinion that the defendant took as purchaser of the interest of George Knight, his possession had not been adverse for twenty years, because it could not be adverse as long as it was uncertain whether Matthew Knight was alive or not, which was up to May 1814. Upon this the counsel for the defendant tendered a bill of exceptions. The jury found that it was not proved that Matthew Knight was alive within twenty years, but that it did not appear that there was an adverse possession of twenty years; and under the learned judge's direction, they found their verdict for the lessor of the plaintiff.

It seems the statute of the 3 & 4 Will. 4, c. 27, was not adverted to at the trial, but only on the case being argued before the Court. We are all clearly of opinion that the second and third sections of that act (which came into operation on the 1st of January 1834, seventeen days before this action was commenced) have done away with the doctrine of non-adverse possession, and except in cases falling within the fifteenth section of the act, the question is, whether twenty years have elapsed *since the right accrued*, whatever be the nature of the possession. The right of entry in this case accrued on the death of Matthew Knight. Then, as the first and second questions were identical, the learned judge was wrong in putting any distinct and separate question to the jury on the nature of the possession, unless the case be within the fifteenth section.

Now, that section applies only where the possession was not adverse, according to the former state of the law, at the time of the passing of the act—that is, the 24th July 1833. If that point had been raised at the trial, it is plain the jury would have been satisfied that the possession was adverse on the 24th July 1833; for we know by the report of *Doe* d. *Knight v. Nepean*, that an action had been brought and tried between the same parties some time before that date. Whether, therefore, the learned Judge took a right view of the defendant's possession or not, under the former state of the law, is immaterial; the 3 & 4 Will. 4, c. 27, applies to the case, and the direction in respect of which the defendant's bill of exceptions was tendered was therefore wrong.

Still, it is necessary to determine the first and principal point in the case, because, if the learned judge's direction was also wrong as to that, the lessor of the plaintiff would be entitled to retain the verdict, although he obtained it on another ground. The Court is therefore called on to review the decision of the Court of King's Bench in *Doe* v. *Nepean*. The doctrine there laid down is, that where a person goes abroad, and is not heard of for seven years, the law presumes the fact that such person is dead, but not that he died at the beginning or the end of any particular period during those seven years; that if it be important to any one to establish the precise time of such person's death, he must do so by evidence of some sort, to

be laid before the jury for that purpose, beyond the mere lapse of seven years since such person was last heard of.

After fully considering the argument at the bar, we are all of opinion that the doctrine so laid down is correct. It is conformable to the provisions of the statute of James I. relating to bigamy, more particularly to the statute 19 Car. 2, c. 6, relating to this very matter, the words of which distinctly point at the presumption of the *fact* of death, but not at the *time*: it is conformable also to decisions on questions of bigamy and on policies of insurance, and it is supported and confirmed by the case of *Rex* v. *Inhabitants of Harborne*. It is true, the law presumes that a person shown to be alive at a given time remains alive until the contrary be shown, for which reason the onus of showing the death of Matthew Knight lay in this case on the lessor of the plaintiff. He has shown the death by proving the absence of Matthew Knight, and his not having been heard of for seven years; whence arises, at the end of those seven years, another presumption of law, namely, that he is not then alive; but the onus is also cast on the lessor of the plaintiff of showing that he has commenced his action within twenty years after his right of entry accrued, that is, after the actual death of Matthew Knight. Now, when nothing is heard of a person for seven years, it is obviously a matter of complete uncertainty at what point of time in those seven years he died; of all the points of time, the last day is the most improbable, and most inconsistent with the ground of presuming the fact of death. That presumption arises from the great lapse of time since the party has been heard of; because it is considered extraordinary, if he was alive, that he should not be heard of. In other words, it is presumed, that his not being heard of has been occasioned by his death, which presumption arises from the considerable time that has elapsed. If you assume that he was alive on the last day but one of the seven years, then there is nothing extraordinary in his not having been heard of on the last day; and the previous extraordinary lapse of time, during which he was not heard of, has become immaterial by reason of the assumption that he was living so lately. The presumption of the fact of death seems, therefore, to lead to the conclusion that the death took place some considerable time *before* the expiration of the seven years.

It is true, the doctrine will often practically limit the time for bringing the action of ejectment in such cases; and circumstances may be supposed, as of a lease for seven years commencing on the death of A., or of a promissory note payable two months after A.'s death, and many other cases which might be put, in which it would be difficult to carry into effect certain contracts, or to have remedies for the breach of them, if the parties interested, instead of making inquiry respecting the person on whose life so much depended, chose to wait for the legal presumption. Such inconveniences may no doubt arise, but they do not warrant us in laying down a rule that the party shall be presumed to have died on the last day of the seven years, which would manifestly be contrary to the fact in almost all instances. No such rule is enacted by the statute, nor is any one authority adduced in which any such rule has been laid down.

It is not necessary to make any election between the beginning of seven years and the end of them, and the period to which the death should be referred, as seems at one time to have been assumed. We adopt the doctrine of the Court of King's Bench, that the presumption of law relates only to the fact of death, and that the time of death, whenever it is material, must be a subject of distinct proof.

For these reasons, we are of opinion that the learned judge's direction to the jury, in respect of which the lessor of the plaintiff tendered a bill of exceptions, was correct, and that the verdict ought to have been found for the defendant; but as we cannot order it to be so entered, the result is that the verdict found for the lessor of the plaintiff must be set aside, and a *venire de novo* awarded.

Venire de novo awarded.

TAYLOR *d.* ATKYNS *v.* HORDE.

HIL. 30 *G.* 2—*IN B. R. ET DOM. PROC.*

[REPORTED 1 BURR. 60.]

Adverse possession before Stat. 3 *&* 4 *W.* 4, *c.* 27.

IN ejectment brought in Michaelmas term 1752, by John Atkyns, Esq. (in the name of Cyprian Taylor) against Robert Atkyns, Esq. the heir-at-law, and others; upon the general issue pleaded, and issue joined thereon, and tried at the bar of this court, the jury find a special verdict: which was in substance as follows :—

That Sir Robert Atkyns the elder, Knight of the Bath, on 8th June, 1669, was (amongst divers other messuages, lands, tenements, &c., in Gloucestershire) seised in fee of the manor of Lower Swell and the other premises in question; and being so seised, made and executed three several indentures (which are set out in the special verdict), one of which is dated on the 11th and the two others on the 12th of June 1669.

By one of these indentures, which was dated on the 12th of June 1669, (which the counsel on both sides, for distinction's sake, called the lesser deed,) made between Sir Edward Atkyns, Knt. one of the Barons of the Exchequer, Sir Robert Atkyns, Knight of the Bath, Solicitor-General to the Queen, and son and heir apparent of the said Sir Edward, and Dame Mary (wife of the said Sir Robert) Atkyns, of the one part; and Sir Edward Carteret, Knt. and John Lowe, gentleman, of the other part; it is witnessed that in consideration of a marriage thentofore had and solemnised between the said Sir Robert Atkyns and Dame Mary his wife, and of her releasing and acquitting a former jointure to her made before marriage, and of a new provision to be had and made for her the said Dame Mary, for and in the nature of a jointure, in bar and recompense

of her dower and thirds at the common law, in case she should happen to survive and overlive the said Sir Robert Atkyns her husband, he the said Sir Robert Atkyns did thereby covenant and grant to and with the said Sir Edward Carteret and John Lowe, that he the said Sir Edward Atkyns, and the said Sir Robert Atkyns and Dame Mary his wife, should and would, before the end of Michaelmas term then next ensuing, levy and acknowledge before the Justices of the Court of Common Pleas at Westminster, one or more fine or fines *sur conusance du droit come ceo*, &c. unto the said Sir Edward Carteret and John Lowe, with proclamations, of the said manor of Lower Swell and the other premises in question: which said fine or fines so as aforesaid or in any other sort to be had, levied and executed, of the said manor and premises alone or together with any other lands, tenements or hereditaments, by or between the parties to the said indenture or any of them, alone or together with any other person or persons, were to be and enure, and were thereby declared to be and enure, as to the said manor and all other the premises, to the use of the said Sir Robert Atkyns for life, without impeachment of waste; and from and after his decease, to the use of the said Dame Mary for life for her jointure and in bar of her dower; and from and after the decease of the said Sir Robert and Dame Mary, to the use of Sir Robert Atkyns, Knt. son and heir apparent of the said Sir Robert, and the heirs male of the body of the said Sir Robert the son, on the body of Lovis Carteret his intended wife lawfully to be begotten; and for default of such issue, to the use of the right heirs of the said Sir Robert the father for ever.

And the said Sir Edward Atkyns and Sir Robert the father did by this deed covenant with the said Sir Edward Carteret and John Lowe and their heirs, that in case any defect should happen in the said fine and that assurance, or in case there should not be some good conveyance in the law made according to the intent of that indenture, so that by reason of such defect or failure of such conveyance and assurance in law, the said manor and premises or any part or parcel of them should not, before the 30th day of November then next ensuing, be sufficiently conveyed according to the intent of the said indenture, then they the said Sir Edward Carteret and John Lowe and their heirs,

and all and every other person and persons and their heirs, standing or being seised, or which should stand or be seised of and in the said manor and premises, should and would from time to time and at all times from thenceforth for ever stand and be seised of and in the said manor and premises, or so much and such part and parts thereof whereof or concerning which any such defect should happen to be, to the uses, behoofs, intents, and purposes thereinbefore declared, limited, and contained, according to the true intent and meaning of the said indenture, and to none other use, intent, or purpose whatsoever.

One other of these three indentures was a lease, dated 11th June 1669: and the remaining one was a release, dated 12th June 1669. This release bore the very same date with the deed already recited (called the lesser deed): and the counsel on both sides agreed in calling this deed of release (for distinction's sake) the greater deed, as this contained the settlement of the whole estate.

By these indentures of lease and release, dated 11th and 12th June 1669, the release being tripartite, and made between the said Sir Edward Atkyns, the said Sir Robert the father and Dame Mary his wife, Philip Sheppard, Esq., Sir Clement Farnham, Knt., and Edward Atkyns, Esq. (second son of the said Sir Edward Atkyns), of the first part;—the Right Honourable Sir George Carteret, Knt. and Bart., Vice-Chamberlain of his Majesty's Household, and one of his Majesty's most Honourable Privy Council; the said Sir Edward Carteret and the said John Lowe; the Right Honourable Edward Montagu, commonly called Lord Hinchinbrooke (son and heir apparent of the Right Honourable the Earl of Sandwich), Sir Philip Carteret, Knt. (son and heir apparent of the said Sir George Carteret), and Edward Swift, Esq., of the second part; and the said Sir Robert Atkyns, Knt. (the son and heir apparent of the said Sir Robert Atkyns), and Lovis Carteret (one of the daughters of the said Sir George Carteret and of Dame Elizabeth his wife), of the third part;—it is witnessed that in consideration of a marriage thentofore had and solemnised between the said Sir Robert Atkyns the father and Dame Mary his wife, and also of a marriage then shortly to be had and solemnised between the said Sir Robert Atkyns the son and the said Lovis Carteret, and of the sum of 6500*l.* paid

to Sir Robert the father by the said Sir George Carteret, for the marriage portion of the said Lovis Carteret, and of 5*s.* a piece to the said Sir Edward Atkyns, Sir Robert Atkyns the father, Philip Sheppard, Sir Clement Farnham, and Edward Atkyns, paid by the said Sir Edward Carteret and John Lowe, and for a provision to be had and made to and for the same Dame Mary (wife of the said Sir Robert Atkyns the father), for and in the nature of a jointure, in bar and recompense of her dower and thirds at the common law; and also for a provision for the said Lovis Carteret, for and in nature of a jointure, in bar and recompense of her dower and thirds at the common law; and for settling all the manors, lands, tenements, and hereditaments thereinafter mentioned, to the several and respective uses, upon the trusts, to the intents and purposes, and with under and subject to the provisoes, declarations, limitations, and agreements thereinafter declared; the said Sir Edward Atkyns and Sir Robert the father did grant release and confirm unto the said Sir Edward Carteret and John Lowe and their heirs, the said manor of Swell and other the premises in question (as described in the lesser deed), and several other manors, lands, and hereditaments therein mentioned, to hold the said manor of Swell and other the premises in question, to the said Sir Edward Carteret and John Lowe and their heirs, to the several uses therein mentioned; which uses (as to the said manor of Swell and other the premises in question) are the same as those before set forth in the lesser deed; *viz.* :—

To the use of Sir Robert the father, for life, without impeachment of waste;

Remainder, as to the said premises (except timber trees), to Dame Mary for life, for her jointure, and in bar of dower;

Remainder to Sir Robert the son, and the heirs male of his body by the said Lovis Carteret;

Remainder to the right heirs of Sir Robert the father.

And several other parts of the estates were limited thereby, to Sir Robert the son for life; remainder to trustees, to preserve contingent remainders; remainder to the said Lovis Carteret for life, for her jointure and in bar of dower, and upon the issue of the said intended marriage, in strict settlement.

In which indenture of release is contained a proviso, in the following words:—

"Provided always that it shall and may be lawful to and for the said Sir Robert Atkyns the father, the said Sir Robert Atkyns the son, and the said Lovis Carteret, respectively, when hey are or shall be respectively seised in possession of the freehold of such of the premises as by virtue of and according to the limitations aforesaid are respectively limited to them for their respective lives, by their respective deed or deeds in writing sealed and delivered in the presence of two or more credible witnesses, to make any lease or demise, leases or demises, of all or any of the said premises whereof they shall be so respectively seised in possession for life as aforesaid, (except of the capital messuage of Sapperton aforesaid, and the said lodge in Pinbury Park aforesaid,) unto any person or persons, for one, two, or three lives in possession, reversion, or remainder, to end or determine upon the death of one, two or three persons, or for the term of twenty-one years absolute; so as there be not, in the respective premises or any part thereof, any estate exceeding the term or time of three lives or twenty-one years, in being at the same time; and so as such respective leases be not made without impeachment of waste; and so as the usual rents of such of the premises respectively as shall be so leased or demised upon fines, and the best rents that can be reasonably gotten for such of the premises respectively as shall be so leased or demised without fines, be respectively reserved upon every such respective lease or leases, demise or demises, to be payable during the respective terms in the said respective leases or demises to be contained; anything hereinbefore contained to the contrary notwithstanding."

And another proviso is therein also contained, in the following words; *viz.*:—

"Provided also that it shall and may be lawful to and for the said Sir Robert Atkyns the father, at any time or times during his natural life, after the decease of the said Dame Mary his wife, by any writing or writings indented, under his hand and seal, testified by two or more witnesses, to grant, assign, limit or appoint the said manor of Swell Inferior, *alias* Nether Swell, and the lands, tenements, and

premises in Swell Inferior, otherwise Nether Swell—Upper Swell, and Stowe in the Would, and in either or any of them, or such parts and parcels thereof as he shall think fit, unto or to the use of such woman or women as he the said Sir Robert Atkyns the father shall marry or take to wife, after the decease of the said Dame Mary his now wife; for and during the term of the natural life or lives of such wife or wives only, for her or their jointure or jointures; anything herein contained to the contrary thereof in any wise notwithstanding."

And by another proviso in this deed, the like power is given to Sir Robert the son, " to make a jointure of all or any of the lands thereby limited to Lovis Carteret for her jointure, on any future wife or wives whom he should marry, after the death of the said Lovis Carteret without issue."

And by the same deed, Sir Robert the father covenants with Sir George Carteret, that Sir Edward Atkyns, he, and Dame Mary his wife, would, before the end of Michaelmas term then next, levy one or more fine or fines *sur conusance de droit*, &c. with proclamations, of the premises contained in this indenture, unto the said Sir Edward Carteret and John Lowe: which, it was thereby declared, should be and enure to the several and respective uses, upon the trusts, and to the intents and purposes, and with, under and subject to the provisoes, declarations, and agreements thereinbefore declared, limited, and expressed concerning the same. And reciting, " that Sir Clement Farnham and Edward Atkyns were possessed of the premises in question, or several parts thereof, for several terms of years then in being, in trust for Sir Robert the father;" it was thereby declared and agreed by Sir Robert the father, that Sir Charles Farnham and Edward Atkyns should stand possessed of the premises comprised in the said terms, during the residue thereof, upon trust and to the use and benefit of the person or persons to whom the premises (by virtue of the limitations therein) should belong.

The jury found that the first of the said indentures was executed by Sir Edward Atkyns, Sir Robert Atkyns the father, and Dame Mary his wife, and John Lowe; the second of the said indentures was executed by Sir Edward Atkyns, Sir Robert the father, Philip Sheppard, Sir Cle-

ment Farnham, and Edward Atkyns, Esq.; and the said indenture of release, by Sir Edward Atkyns, Sir Robert the father, Dame Mary his wife, Sir Clement Farnham, Edward Atkyns, Esq., Sir George Carteret, Sir Philip Carteret, Edward Swift, Sir Robert Atkyns the son, and Lovis Carteret; and that the lease for a year was executed before the release.

That in Trinity Term, 1669, a fine was levied; wherein the said Sir Edward Carteret and John Lowe were plaintiffs, and the said Sir Edward Atkyns, Sir Robert the father, and Dame Mary his wife, deforciants, of the premises in question (amongst the said other lands contained in the greater deed): but no fine was ever levied of the lands contained in the little deed only.

Afterwards, on the 6th of July 1669, Sir Robert the son was married to the said Lovis Carteret.

Dame Mary (the wife of Sir Robert the father) died on 2d March 1680:

After which, *viz.* on 26th April 1681, Sir Robert the father, being seised of the premises in question, as of freehold, for the term of his natural life, without impeachment of waste (and being then on the point of marrying a second wife, Mrs. Ann Dacres), duly executed an indenture under his hand and seal, attested by three witnesses, bearing date the same 26th of April 1681, and made between himself of the one part, and Sir Robert Dacres, Knt., John Dacres, and Ann Dacres, spinster, (sister of Sir Robert Dacres and John Dacres,) of the other part: by which indenture (after reciting the above-mentioned indenture of release tripartite of the 12th of June 1669, and the power thereby reserved "for the said Sir Robert Atkyns the father, after the death of Dame Mary, to limit all or any part of the manor and premises in question, to any future wife or wives he should happen to marry, for the term of the natural life or lives of such wife or wives only, for her or their jointure or jointures") it is witnessed that in consideration of the then intended marriage between the said Sir Robert Atkyns the father and the said Ann Dacres, and of her marriage portion, the said Sir Robert Atkyns the father, in pursuance of the said power to him reserved, and of all and every power and authority whatsoever, did grant, assign, limit, and appoint the said manor of Swell, and other the premises in question,

unto the said Ann Dacres, for and during the term of her natural life, for her jointure, and in bar and recompense of her dower and thirds at the common law.

On the 28th April, 1681, the said Sir Robert Atkyns the father married the said Ann Dacres.

On 31st May, 1698, Sir Robert Atkyns the father, being seised of the premises in question, as of freehold for life, without impeachment of waste, executed an indenture of lease, under his hand and seal, attested by three witnesses, dated on the same 31st day of May 1698, and made between himself of the one part, and Thomas Dacres, Esq., Robert Dacres, Gent., and John Dacres, Gent. (the three sons of the before-named Sir Robert Dacres, Knt., and nephews of Dame Anne Atkyns then wife of Sir Robert Atkyns the father), of the other part. This indenture of lease recites the indenture tripartite of release of the 12th of June 1669; whereby Sir Edward Atkyns and Sir Robert Atkyns the father did (amongst other lands) grant, release and confirm to the said Sir Edward Carteret and John Lowe, and their heirs, the said manor of Swell Inferior, otherwise Nether Swell, with the appurtenances, and all those rents of assize of the free tenants of the said manor extending to one halfpenny and one pound of pepper; and all the rents of customary tenants of the said manor; and the capital messuage and farm of the Bold; and the park called Swell Park, otherwise Abbott's Wood; and all and all manner of tenths or tithes of the said park; and the barcary or sheep-house called Gannow, and the grounds or closes of meadow or pasture adjoining or belonging thereto; and the water-mill called Bold Mill, with the dams, streams, waters, attachments, fenders, soak, suit, mulcture, grist, and appurtenances thereunto belonging; all the tolns of the customary tenants of the said manor, and all and all manner of tenths and tithes of all the premises whatsoever, which unto the late dissolved monastery of Hales did belong; all that common of pasture for 400 sheep and 20 beasts, upon the hills and fields of Nether Swell, at all times in the year except in the open time, and in the open time common of pasture within the said fields for all manner of beasts without number, rate, or stint; and the several pastures called Murden Leasows; all that barcary or sheep-house within the said pasture; all that pasturage or feeding for 600

sheep, or for more or less at the will and pleasure of the tenant of the said pastures called Murden Leasows for the time being, in and upon the demesne lands, waste lands, and other lands belonging to the said farm of the Bold or elsewhere, in such ample manner as the late abbot of the said dissolved monastery of Hales aforesaid and his predecessors had kept and occupied the same within the manor of Swell aforesaid; all those grounds in Nether Swell aforesaid thentofore in the tenure of John Winsmore or his assigns; all that half-acre of land in Nether Swell sometimes in the tenure of the curate of the church of Stowe, in the said county of Gloucester; all that fishing of the river or water of the whole manor of Nether Swell, with all profits and commodities to the same belonging; all those portions of tithes whatsoever, and all and all manner of tithe of corn, grain, blade, sheaf, hay, wool, lambs, pasture, and other tenths and tithes whatsoever in and upon the premises or any part of them growing, renewing or increasing (being the premises in question); to the several uses by the said indenture limited as aforesaid: And it also recites the power to the said Sir Robert Atkyns the father, "for leasing the premises," as it is set forth in the said indenture. Then it is witnessed by this indenture of lease, that the said Sir Robert Atkyns the father, in consideration of the rent thereby reserved, in pursuance of the power to him reserved in and by the said recited indenture, and by virtue thereof, and of all and every power and authority whatsoever, did, by that his present writing indented, under his hand and seal, testified by the several witnesses whose names are thereupon indorsed, demise, lease, grant, and to farm let, to the said Thomas Dacres, Robert Dacres, and John Dacres, and their assigns, the said manor, and all and singular the said lands, tithes, tenements, hereditaments, and premises, with their and every of their rights, members, and appurtenances, in Swell Inferior, otherwise Nether Swell; and all and every the rents reserved upon any leases or grants; to hold to them the said Thomas, Robert, and John Dacres, from the making thereof, for and during the natural lives of them the said Thomas, Robert, and John Dacres, and the life of the longer liver of them; yielding and paying therefore, during the said term, unto the said Sir Robert Atkyns party thereto, and after his decease, to such person

or persons respectively to whom the said manor and premises were limited, according to their respective estates and titles, the yearly rent of three hundred and threescore pounds, at Michaelmas and Lady-day, by even and equal portions.

In which said indenture of lease is contained a clause, in these words; *viz.* :—" The true intent and meaning of this estate or term for lives, so hereby granted and made to the said Thomas Dacres, Robert Dacres, and John Dacres, and the survivor of them, being to preserve the said remainder so limited in the premises by the said recited indenture, to the right heirs of the said Sir Robert Atkyns party to these presents, and to such person or persons to whom the said Sir Robert Atkyns party to these presents shall any way dispose of the same, from being barred of any recovery to be suffered, or by any other act to be attempted or done for the barring of the same."

On the 8th June, 1698, John Dacres, one of the lessees in the last above-mentioned indenture of lease, alone, executed a letter of attorney, under his hand and seal, reciting the said last indenture of lease, and empowering and authorising Thomas Barker, Gent. as his attorney, to take livery and seisin of the premises last above mentioned, from the said Sir Robert Atkyns the father; for himself (the said John Dacres) and for the said Thomas and Robert Dacres and every of them, in their names and for their use, according to the purport and true meaning of the said recited indenture of lease; and to enter and take possession of the said manor and premises in the said indenture contained, to the use of them and every of them; he the said John Dacres allowing of all and every the act and acts so done by the said attorney, to be as effectual and sufficient in law, as if he had been personally present and had done the same.

On 5th July, 1698, Sir Robert Atkyns the father, being so seised as aforesaid, and then in the actual possession of the said manor and premises, did, in his own person, deliver seisin and possession thereof unto the said Thomas Barker, to the use of the said Thomas, Robert, and John Dacres and of every of them, and of the survivor of them, according to the purport and true meaning of the said indenture; he the said Thomas Barker being authorised and appointed, by a letter of attorney under hand and seal of the said John

Dacres, and by him duly executed, " for him and to his use and in his name, and for the said Thomas and Robert Dacres, and to their use and in every of their names, to take and receive the said livery and possession of the said capital messuage, manor, and premises, accordingly ;" as by an indorsement on the said letter of attorney (which is set out in the verdict) appears.

But the jury found that the said Thomas Dacres, Robert Dacres, and John Dacres, the lessees named in the last-mentioned indenture, or either of them, never were in possession of the premises in question, otherwise than by the said livery and seisin so given by the said Sir Robert Atkyns the father as aforesaid ; and that they or either of them did not receive or pay any rent for or in respect of the said premises ; and that the said indenture of lease was not found in the custody of Thomas Dacres, the surviving lessee, at the time of his death.

On 27th May, 1708, Sir Robert Atkyns the father, being so seised of the said premises and of the remainder and reversion thereof as aforesaid, made his will, dated the same 27th day of May 1708, attested by four witnesses ; and thereby confirmed his wife's jointure ; and then recited, " that he was seised of the remainder and reversion in fee of the said manor and other the premises in question ; and that such remainder or reversion, after the death of his wife, was also further expectant upon an estate in special tail, settled upon his son Sir Robert upon his marriage, by the above-mentioned deed of 12th June 1669 ; and that he had made a lease to the said Thomas, Robert, and John Dacres, for their lives and the life of the longer liver of them, according to the power he had reserved to himself upon the said settlement." After which recital, he disposed of his said remainder or reversion in fee, to the lessor of the plaintiff, in tail male.

The whole devise was in the following words ; *viz.* :—" I give and confirm unto my said wife Dame Ann Atkyns, all those lands, tenements, and hereditaments in Lower Swell aforesaid, which were settled upon her for her jointure, before our marriage : and I hereby further give and devise to her, for term of her life, my manor of Lower Swell, and all the rest of my lands, tenements, and hereditaments whatsoever in Lower Swell aforesaid, for term of her life,

as an addition to her jointure. And whereas I am seised of the remainder and reversion in fee of the said manor of Lower Swell, and of the rest of the said lands, tenements, and hereditaments in Lower Swell, so settled, and by this my will given and confirmed to my said wife for her life; which remainder or reversion, after the death of my wife, is also further expectant upon an estate in the said manor and lands in special tail settled upon my son Sir Robert Atkyns upon his marriage, by deed dated the 12th of June 1669, and upon his sons by his now wife and no other wife; and whereas I have made a lease, dated (*a*) the 8th day of June, in the year of our Lord 1698, executed by livery and seisin, to Thomas Dacres, Esq. and to Robert and John Dacres, Gentlemen, for the lives of the said Thomas, Robert, and John Dacres, and the life of the longer liver of them, according to a power I reserved to myself upon the said settlement made upon the marriage of my said son Sir Robert Atkyns; now I give and devise the said remainder or reversion, and the benefit of the trusts of the said lease for lives, to my grandson John Tracy (the now younger and second son living of my son-in-law John Tracy of Stanway in the said county of Gloucester, Esq., by my daughter Ann Tracy his wife), and to the heirs male of the body of my said grandson by him to be begotten. And if my said grandson happen to die without issue male, then I give and devise the said remainder or reversion to the next younger son of the said John Tracy my son-in-law, called Ferdinando Tracy, and to the heirs male of the body of the said Ferdinando. And for default of such issue, then I give and devise the said remainder or reversion to the next younger son my said son-in-law John Tracy may happen to have by my said daughter, and to the heirs male of the body of such next younger son;" and so on, to other still younger sons, &c. (These devises were all upon condition that the said sons respectively so inheriting the said manor and lands, should constantly use to call and write themselves by the name of Atkyns only, for their surname, and by no other surname.) And then the will proceeds thus:—"I do further give and devise all my houses, and all lands, tenements, and hereditaments, situate, lying, and being in or near Cursitor's Alley in Holbourn, within the city of London or the suburbs thereof, or within the county of Middlesex, or

(*a*) The testator mistakes the date of this lease. It was 31st May.

in either of them;" in like manner, and upon the like condition, &c. And, reciting that the reversion or remainder of his manor and lands in and of Sapperton aforesaid, and of the advowson of the church of Sapperton, and of and in his manor of Pinbury and of the lands thereto belonging, as also of Pinbury Park, was in him and his heirs; and also of the Seven Hundreds of Cirencester, and of the Hundred of Bisley (all in the said county of Gloucester); he devised the same in like manner. The words of his will are these: —" I have also made a lease for lives of the said manors of Sapperton and Pinbury, and of the said advowson of Sapperton, and of the said Pinbury Park, and of all the said several hundreds, the better to preserve and support the said remainders and reversions from being cut off or barred by any recovery. And if my said younger grandsons happen to die without issue male, then I give and devise the same reversions and remainders to my nephew Richard Atkyns (eldest son of my late brother Sir Edward Atkyns, deceased) and to his heirs."

On 9th February, 1709, Sir Robert Atkyns the father died, seised of the premises in question.

Upon his death, Dame Ann, his widow and relict, entered thereupon; claiming the same for her life, for her jointure, under and by virtue of the above-mentioned indenture of 26th April 1681; and was in possession thereof.

The jury then find an indenture tripartite dated the 18th of May 1710, made between Richard Atkyns, Esq. eldest son and executor of Sir Edward Atkyns (the surviving trustee in whom the term for years mentioned in the greater deed were vested), on the first part; Joseph Walker, Gent. on the second part; and the said Sir Robert Atkyns (the son) on the third part: by which, after reciting the indenture of release of 12th June 1699, and that it was therein mentioned that Sir Clement Farnham and Edward Atkyns were possessed of several terms for years in the premises in question, and that they were to stand possessed thereof in trust for such person and persons to whose use and uses the same were limited by the said indenture; and reciting that the said Sir Robert Atkyns (the son) then claimed the said manor and premises by and under the said indenture; and that Sir Clement Farnham was dead, and the said Edward Atkyns (afterwards Sir Edward Atkyns, Knt., Lord Chief

Baron of the Exchequer) survived him, and was also then dead, having first made his will, and the said Edward Atkyns executor thereof, and that he had proved the same; the said Richard Atkyns, at the instance and request of the said Sir Robert Atkyns (the son) testified by his executing the said indenture, and in consideration of 5*s.* paid to him by the said Joseph Walker, assigned over the said manor and premises in question to the said Joseph Walker, to hold to him, his executors, administrators, and assigns, for all the then residue and remainder of the said terms, whereof the said Sir Clement Farnham and Edward Atkyns or either of them were possessed; in trust for the said Sir Robert Atkyns (the son) and the heirs male of his body by the before-mentioned Dame Lovis his wife (the said premises being so limited in and by the said indenture of release of 12th June 1669). In which said indenture there is a covenant from Sir Robert (the son) to indemnify the said Richard Atkyns, his heirs, executors, and administrators, against any damages he or they might sustain by reason of his making the said assignment to the said Joseph Walker as aforesaid.

The jury further find that Dame Ann Atkyns being so in possession of the premises as aforesaid; in Trinity Term 1710, 9 Ann, an ejectment was brought in the Court of Common Pleas, for the recovery of the said premises, against her the said Dame Ann and the tenants in possession of the same premises, by John Philips, upon the several demises of the said Sir Robert Atkyns the son, and of the said Joseph Walker: in which ejectment, the demises were laid upon the 22d day of May, 9 Ann. To hold from the 20th day of the same May for seven years. And the said ejectment was tried at the bar of the Court of Common Pleas, in Michaelmas Term following: and a general verdict was found for the plaintiff; and judgment was entered up thereupon against her and the rest of the defendants therein, for the said John Philips; and he recovered *terminum suum predictum*, and had an *habere facias possessionem*.

The jury further find, that upon this trial the said two indentures, called greater and lesser deeds, of 12th June 1669, were, both of them, read and given in evidence to the jury: but that the deed of assignment of 18th May 1710 was not produced, nor given in evidence, to the jury.

They find that soon after the said judgment in ejectment, and during the life of Dame Ann, Sir Robert Atkyns (the son) entered into and was in possession of the premises in question, and in the said declaration in ejectment mentioned.

They find that on 1st January, 1710, John Philips, the said plaintiff in ejectment, surrendered the two terms mentioned in the said declaration in ejectment to be demised to him by the said Sir Robert Atkyns (the son) and Joseph Walker, to the said Sir R. A. (the son) then in possession of the premises.

They further find that on 17th January, 1710, the said Sir R. A. the son, being so in possession as aforesaid, and during the life-time of the said Dame Ann Atkyns, widow, made a feoffment to James Earle, of the premises in question, in fee; by indenture tripartite of that date, made between himself, on the first part; James Earle, yeoman, on the second part; and John Holmden, Gent. on the third part: which feoffment in fee is therein declared to be for the docking, barring, and destroying all estates tail, use and uses, reversions and remainders, at any time thentofore made, created, or limited of and in the manor and premises in question; and for the vesting and settling an estate in fee simple therein, to and in the said Sir Robert the son. Sir Robert (the son) did therefore, in consideration of *5s.*, thereby grant, bargain, sell, enfeoff, and confirm unto the said James Earle, his heirs and assigns, the premises in question, to hold to and to the use of the said James Earle, his heirs and assigns for ever; to the intent and purpose that the said James Earle might become perfect tenant of the freehold of the said premises, in order for the suffering a common recovery in Hilary Term then next; wherein the said John Holmden was to be demandant, the said James Earle tenant, and Sir Robert himself vouchee. Which recovery, it was thereby declared, was to be and enure to the use and behoof of the said Sir Robert Atkyns (the son), his heirs and assigns, for ever; and to or for no other use, intent, or purpose whatsoever. And by this same deed, Sir Robert Atkyns (the son) constituted Edward Carter and John Longford his attorneys and attorney, either jointly or severally to enter upon and take seisin and possession of the premises, and to give and deliver seisin and possession thereof to the said James Earle and his heirs and

assigns for ever, according to the purport and true meaning and for the purposes in the said deed mentioned.

And the jury find that, on the 20th January, 1710, Edward Carter, one of the said attorneys, entered upon the premises, and gave seisin and possession thereof to the said James Earle, by virtue of the said warrant of attorney contained in the said indenture: as appears by a memorandum indorsed upon the said indenture, and found by the verdict.

They find that in Hilary Term, 9 Ann. (1710), a recovery was suffered of the premises, wherein John Holmden was demandant; James Earle, tenant; and Sir Robert Atkyns (the son) and Lovis his wife, vouchees, and seisin executed thereon: which recovery they find to be prosecuted, had, and executed to the several uses mentioned in the said deed of feoffment. And they find that, after this recovery, Sir Robert (the son) continued in possession of the premises till the 9th of November, 1711.

They find the death of the said Sir R. A. (the son) on 9th November, 1711, without issue male by the said Lovis his wife, who survived him.

They also find that an ejectment was brought for the premises, against the present defendant, Robert Atkyns, Esq., and his tenants of the premises in question, in Hilary Term 1711, 10 Ann., by John Miles, as plaintiff, on the several demises (both laid to be made on 14th February, 8 Ann. 1709, which is five days after Sir R. A. the elder's death) of Dame Ann Atkyns the jointress, and of Thomas Dacres, the surviving lessee under the indenture of lease of 31st May, 1698. And in Easter Term 1712, 11 Ann., a general verdict was given for the plaintiff, on both demises, on a trial at bar in this court: and judgment was entered up accordingly, "that the plaintiff do recover his several terms aforesaid." And the said Dame Ann Atkyns entered upon the premises in question immediately after this last judgment, and continued in possession thereof till 9th October, 1712, when she died.

Soon after the death of Dame Ann, the (original) defendant, Robert Atkyns, Esq., nephew and heir-at-law to Sir R. A. the son (and also heir-at-law to Sir R. A. the father) entered upon the premises, and continued in possession thereof till his death; which happened on 16th March, 1753. [Robert's death was just three

months after the now lessor of the plaintiff's actual entry: and it was after issue joined in this present ejectment.]

John Dacres, one of the lessees in the indenture of lease, dated 31st May, 1698, died in 1705.

Robert Dacres, another of them, died in 1706.

Thomas Dacres, the third of them, survived the other two; and died on 23d July, 1752.

They find that John Atkyns, the lessor of the plaintiff, never was in possession of the premises in question, or any part thereof, nor in receipt of the rents and profits thereof, or of any part thereof; nor entered thereupon, till the 15th of December, 1752; when he made an actual entry into and upon the same; claiming the same as devisee thereof under and by virtue of the will of the said Sir Robert Atkyns the father; and ejected, drove out, and removed the said Robert Atkyns, Esq., Charles Coxe, Thomas Horde, &c., therefrom; and was seised thereof as the law requires; and being so seised thereof, made the demise to the said Cyprian Taylor the now plaintiff, on the 16th of December, 1752, to hold from thence for fifteen years: by virtue whereof the said Cyprian Taylor entered on the 18th, and was ejected by the defendants on the 19th.

And then they conclude generally, as usual; submitting the matters of law to the judgment of the Court upon the above facts.

This case was argued four several times: first, on Tuesday, 3d June, 1755, by Mr. *Yorke*, for the plaintiff; and Mr. *Knowler* for the defendants. Again, on Tuesday, 11th November, 1755, by Mr. *Pratt* for the plaintiff, and Mr. *Perrott* for the defendants; a third time, on Tuesday, 11th May, 1756, by Mr. *Caldecot* for the plaintiff, and Mr. Serjeant *Prime* for the defendants; and a fourth time, on Friday, 19th November, 1756, by Mr. *Caldecot* for the plaintiff, and Mr. *Knowler* for the defendants. But it is unnecessary to repeat the three first arguments particularly, because the last includes the general substance of them.

The sum of what was urged on the part of the plaintiff was, that the leasing and jointuring powers existed at the time when they were executed by Sir Robert Atkyns the father; that those powers were well executed by him; that the lease and jointure made by him, in pursuance of those

powers, were an impediment to his son Sir Robert the younger's suffering a common recovery; that even supposing that James Earle was a good tenant to the *præcipe*, yet the entry of Dame Ann the jointress, within the five years, avoided this recovery; and, consequently, that the remainder or reversion in fee, devised to the lessor of the plaintiff by Sir Robert the father, was not barred by the recovery thus suffered by Sir Robert the son.

These points were entered into very largely by Mr. *Caldecot* and the gentlemen who had spoken before him on the same side.

First, they endeavoured to prove that the powers reserved to Sir R. A. the father by the two deeds of 12th June, 1669, were in being and valid at the time of the execution of the lease to the Dacres; and secondly, that they were well executed; and, consequently, that there were estates of freehold subsisting at the time when Sir R. A. the son made the feoffment to Earle; *viz.* Dame Ann's jointure, and the lease to the Dacres. And therefore, thirdly, they insisted that these life-estates were impediments to Sir R. A. the son's suffering the common recovery. For they denied that Sir Robert Atkyns the son was tenant in tail in possession at the time that he made the feoffment to James Earle: so that Earle could not be a good tenant to the *præcipe*.

And they insisted that even admitting that Sir R. A. the son was tenant in tail in possession, yet he could not upon this naked possession, without the freehold, make a good tenant to the *præcipe* without the jointress and the lessee for life's joining. And that the Court cannot (under 14 Geo. 2, c. 20, sec. 1) presume a previous surrender or conveyance of the estates for life, in order to make the recovery good.

Fourthly, they further insisted, that supposing Sir Robert Atkyns the son was tenant in tail in possession, and also that there was a good tenant to the *præcipe* (so that the recovery was good, as a common conveyance), yet the re-entry of Dame Ann Atkyns, the jointress, within the five years (in 1712) actually avoided this recovery; which, if not void, was at least voidable by the tenant for life: and this re-entry of the tenant for life re-vested all the subsequent estates.

The great stress of the question lies (as they said) upon the tenant to the *præcipe.*

1st Point. The first point, in order of time, is the validity of the two powers created by the greater deed of 1669.

But there is no ground, either for the supposition of a fact, " that the lesser deed must have been executed last ;" nor for any inference in point of law, " that it operates to the extinction of these powers."

The fact concerning the priority of execution of the two deeds cannot now be determined by any evidence : therefore presumption must determine it.

Now one of these deeds is an agreement to execute the other : consequently, must have been prior to it. The lesser deed covenants ; the greater performs that covenant : therefore the lesser was prior. If it had been executed last, that would have destroyed the very effect of it and the powers raised by it. Dame Mary was giving up and exchanging her former jointure, and therefore she might desire a single distinct deed to secure her own interest. For which purpose, a deed of covenant was the most proper. And there was no need to incumber this lesser deed, with the powers inserted in the greater deed ; which powers did not concern her. Whereas, in order to support a contrary argument, it is necessary to suppose a new agreement (without, and even against, any reason for it) to alter and destroy the former agreement. But if the parties had meant so, they would have so expressed it.

However, supposing the lesser deed to have been actually executed last, yet being all *uno flatu*, the law will order the time, so that the proper deed shall be taken to be anterior, and the other subsequent, according to the reason of the thing and the intent of the parties. *Digges's* case, 1 Co. Rep. 173 ; *Albany's* case, 1 Co. Rep. 107, and 2 Rep. 75, the Lord *Cromwell's* case.

And the operation of the fine will follow the construction of the deed.

Countess of *Rutland's* case, 5 Co. 26 a.

2d Point. Therefore the existence of the powers being established, the next question is, " whether they have been well executed ?" Dame Mary's jointure has not been objected to ; but the lease made to the Dacres has : first, as being without a subsisting power in Sir R. A. the elder, the lessor, to

make it; secondly, as being fraudulent, even supposing him to have had power to make it; thirdly, as the livery and seisin was made to the attorney of one only of the three lessees, and not to all three, or their joint attorney.

Now it is true that a tenant in tail in possession may suffer a recovery: so also may a tenant in tail in remainder, if he can get in the tenant for life.

But the original donor may interpose as many estates for life as he pleases, before and prior to the tenancy in tail. And this lease to the Dacres, under the power, is just the same as if it had been originally interposed. And the declaration of the intention will not vitiate the estate limited to these Dacres: if it had been even a condition annexed, in restraint of alienation, such a condition would have only been void, and the estate good. Co. Litt. 24 a; *Corbet's* case, 1 Co. 84; *Mary Portington's* case, 10 Co. 35 b.

As to fraud—there is nothing fraudulent in this lease. And both the terms have been actually recovered at law.

If Sir R. A. the father's superfluous declaration has any effect, it makes the lease good: and it would have been adjudged good, if it had been called in question whilst it subsisted. 2 *Leon.* 132. *Moore* and *Savill's* case.

And no one is hurt or defrauded by this lease. Not the jointress: for the full and best rent is reserved. Therefore Cro. Eliz. 5, the Countess of *Sussex's* case does not affect this case: for there, the jointress suffered. Nor is the tenant in tail hurt; for the same reason, as to his rent: and as to the postponing his power to suffer a recovery, it was legal, and might have been done by a real actual demise for life or lives. And the eyes of this Court do not pierce further than the shell of the conveyance, not to the design of it. As in cases of terms to preserve contingent remainders, this Court cannot hinder the trustee from destroying them: so, of terms to attend inheritances; which this Court cannot hinder the mortgagee from getting in. Cro. Car. 190, the case of *Nash* v. *Preston*, is a strong case to show that the court of law will not meddle with the equity of the case.

Now this lease has pursued the power: and this Court will not meddle with the intent.

Leases made by churchmen, for the benefit of their fami-

lies, are generally as fictitious as this: and yet they are always allowed to be good.

As to the livery and seisin—this livery to Thomas Barker enured to the use of all the three Dacres, according to the purport and true meaning of the letter of attorney, most explicitly therein expressed, and so declared at the time of the livery, by Sir R. A. the elder who gave it.

This sufficiently appears (as the present infeoffment was by deed) from Bro. Abr. title *Feffements de terres,* pl. 16, 67, 72, and Co. Litt. 48 b. 49 a. But 2 Anders. 196, pl. 14, the case of *Davy* v. *Abbot*, is in point: 'tis most exactly the same case as this.

So that the life-estates of Dame Ann and of the three Dacres appear to have been well created.

Consequently therefore, a double freehold is sufficiently established; *viz.* one in Dame Ann, the other in the Dacres.

3d Point. From hence it follows, thirdly, that Sir Robert Atkyns the son was by them precluded from suffering this recovery; as he was not tenant in tail in possession at the time of his making the feoffment to James Earle. Therefore he was to gain a freehold as he could, by right or wrong: and it may be said that either of them will do.

But even supposing him to have been tenant in tail in possession, yet James Earle was no good tenant to the *præcipe.*

When he recovered against Dame Ann, he was not tenant in tail in possession: but he recovered against her upon a supposition "that he was;" which supposition was grounded therefore upon a mistake. And the terms which Philips recovered as his lessee, and surrendered to him, were both of them fictitious. So that the feoffment to Earle must fall to the ground, having no foundation to support it. And though livery was given to him by Sir Robert, yet Sir Robert himself continued in possession till his death.

Which observations being premised, this part of the case may be considered, first, on Sir Robert's verdict and judgment against Dame Ann; and secondly, on his subsequent feoffment to Earle.

First—His entry under the judgment cannot amount to a disseisin: nor had he thereby an estate pursuant to his

title, as there claimed by him; it could not be more than an estate in tail, expectant upon two freeholds. It could not be a disseisin; because it was an entry under a verdict. In truth, he gained only a bare, naked possession, without the freehold. And so is the writ of *habere facias possessionem:* and the judgment is "to recover the term" only. And Cro. Eliz. 438, the case of *Bateman* v. *Allen* (upon a devise the same with that in the case of *Newys and Scholastica his wife* v. *Larke*, in Plowd. 403), also proves this.

Therefore the entry under the judgment in ejectment could give no title to Sir R. A. the son to suffer a recovery: it was a lawful entry, but an unlawful holding. Co. Litt. 57 b. A wrongful withholding is not a disseisin, but a deforcement. Co. Litt. 277 b., 331 b., 354 b., 355, 356. And this is without the freehold.

'Tis like the cases of tenant at sufferance: 12 Assise 22; Co. Lit. 57 b; 1 Ro. Abr. 659, title Disseisin, letter C. pl. 10, 11; Cro. Jac. 169; the case of *Butler* v. *Duckmanton;* Co. Lit. 270, 271; Cro. Eliz. 238, the case of *Allen* v. *Hill.* All which cases concur to prove "that nothing shall operate by way of disseisin but a tortious entry."

And there is no middle kind of holding, between a naked possession, that disturbs nothing, and a fee, which disturbs everything.

Then, secondly, as to the feoffment to James Earle. It gained no estate to Earle. This is a very great point to families, for the preservation of intails.

If the contrary construction should prevail, even tenants at will might do the same thing.

But the line is drawn thus: viz., "that a tenant in tail, with the freehold, may bar: but without it, he cannot."

A real feoffment, indeed, may do it; but a fictitious one cannot; but shall be considered as fraudulent and void, like that in *Saville*, 126. *Leon. White* v. *William Bacon.* It is not a discontinuance: *Swift* v. *Heath*, Carthew 109, 110.

Sir R. A. the son gained no fee by it, to himself; nor any to Earle: and the Court will consider it as merely collusive.

That he gained none to himself, appears from 1 Brownlow, 230; Dame *Pett's* case; 2 Inst. 412, 413; Cro. Car. 302; *Blunden* v. *Baugh;* Bracton, lib. 4, pa. 161, 162; Co. Litt. 153; Dy. 62; 11 Assize, 6; *Powsley* v. *Blackman*, Cro. Jac. 659; *Bull* v. *Wyat*, Cro. Car. 388.

That he gained none to Earle is equally true. Earle gained no estate of freehold by this feoffment, either as a wrong-doer or as a disseisor. 1 Ventr. 360, Sergeant Maynard's argument in *Moor* v. *Pitt.*

He might, indeed, be taken as a disseisor, at the election of the right owner; but not against it. And here was no intention of a disseisin. Cro. Jac. 643, *Ferrers* v. *Farmer;* 1 Mod. 107, *Fountain* v. *Cooke.* In fact, here was no actual disseisin: for Sir R. A. the son continued in possession. Neither was here any force or expulsion. And it is not every entry that is a disseisin: 'tis no disseisin, unless there be an expulsion. Co. Lit. 181; 1 Salk. 246, pl. 2, most expressly.

Considering this feoffment as part of the conveyance of a common recovery, as a common assurance, Sir Robert the younger had no power to make a feoffment.

It is not hereby meant that he could not in fact make a feoffment: every man in possession may do it. But this Sir R. A. the son could not convey an estate of freehold by any rightful conveyance—as fine, release, or bargain and sale. And if he cannot do it by a rightful method, will the law permit him to do it by a wrongful one? Surely not. The possession of a tenant at sufferance is not sufficient to build a title upon. Co. Litt. 278; Cro. Jac. 169; Cro. Eliz. 238.

Common recoveries are now considered as a mere conveyance: and the recoveror is a mere instrument and creature of the tenant in tail. 2 Rep. 77, *Cromwell's* case; Poph. 23, the case of *Crocker and York* v. *Dormer;* Cro. Jac. 643, *Sir John Ferrers and Sir John Curson* v. *Sir Richard Fermor and others;* 2 Ro. Rep. 247, S. C. (at the end of it); 1 Mod. 107, *Fountain* v. *Coke.* So, the known case of copyholds, 4 Co. 28, a.; Coke's *Compleat Copyholder;* and the case in 1 Ro. Rep. 223, *Herbert* v. *Binion.*

From all which cases it is clearly to be inferred, that the whole transaction is one common assurance; that the recoveror is a creature and instrument of the tenant in tail; and that it shall not be considered as a tortious entry and a disseisin in a common assurance.

Such a feoffment as this may be made by any person in possession; and if this should be established, it may be of very mischievous consequence, and will introduce a new law, contrary to all former rules and doctrines.

The Stat. 14 G. 2, c. 20, considers a common recovery as a common assurance; and has a proviso, "that the person had a title to make a tenant to the *præcipe*." And here is not the least ground to presume that the tenants for life either joined or surrendered their estates.

Now if the law considers that some persons have this power, and others have not, the law will never suffer that to be done by fraud, which cannot be done fairly and regularly. And this whole transaction is fraudulent and collusive, and done *eo animo* to bar the subsequent estates; and is therefore void, as a fraud, within the rule and reason of *Fermor's* case, 3 Co. 77 b., which considers an estate made by collusion and fraud as no estate.

Lastly.—Admitting the facts of Sir R. A. the son's being tenant in tail in possession; and also that there was a good tenant to the *præcipe;* yet the re-entry of the jointress actually avoided it, and revested all the subsequent estates. 4th Point.

If the recovery was not absolutely void, but good as a common conveyance, yet it was voidable: and if it was voidable, then it was actually avoided by the entry of Dame Ann upon demises laid as far back as the 14th of February, 1709.

To prove this, they applied the cases in 11 Co. 51 b., *Lifford's* case; Cro. Eliz. 540, *Holcomb* v. *Rawlyns;* 1 Anderson 352, *Butler* v. *Baker;* Fitz-Gibbon 225, *Bunker* v. *Cooke;* *Holt's* cases, 748; 1 Co. 14 b., *Sir William Pelham's* case; and a case in C. B. in H. 12 Ann., *Goodtitle* v. *Risden.*

It is like the regress of a disseisee, which avoids all intermediate acts by relation.

Mr. *Knowler*, who twice argued this case for the defendants, included in his last argument all that had been or could be urged on that side of the question; and it was to the following effect:—

The main question upon this case is, "whether the recovery suffered by Sir R. A. the son be a good recovery."

For 'tis insisted by the lessor of the plaintiff, "that the recovery is void, as being suffered by a person who had only a bare possession, and had no power to make a tenant to the *præcipe*."

But if the recovery is good, the lessor of the plaintiff can have no title; because he claims under a limitation in fee,

expectant on the determination of an estate tail, which is barred by the recovery.

The limitations under which all the parties derive their title are contained in two deeds, dated 12th June, 1669; which, from their bulk, and for distinction's sake, have been called the great deed and the little deed.

The great deed is a release, grounded on a bargain and sale for a year; the little deed is a covenant to levy a fine, and a declaration of the uses of the fine.

In speaking to the question,

Four matters must be taken into consideration; viz.:—

First, the order in which the two deeds were executed; and in what manner they influence each other. And from this consideration it will appear, whether the leasing and jointuring powers did exist at the time when they were exercised by Sir Robert Atkyns the father.

Secondly, supposing the leasing and jointuring powers did then exist, then whether those powers were well executed by the said Sir Robert the father.

Thirdly, supposing they were well executed, then whether the lease or the jointure, made pursuant to these powers, were an impediment to Sir Robert Atkyns the son's suffering the recovery.

Fourthly, if the recovery was good, then whether the reentry of Dame Ann, under the second ejectment, did avoid it.

1st Point. First, as to the order in which the two deeds were executed, and in what manner they influence each other.

It is found by the verdict, that Sir R. A. the father, being seised of the estate in question and of several other estates, on 12th June, 1669, made and executed three indentures. By the first, he, in consideration of a marriage before that time had with Dame Mary his then wife, and of her releasing a former jointure made to her before their marriage, covenanted that he and the said Dame Mary his wife and Sir Edward Atkyns (his father) would levy a fine to Edward Carteret and John Lowe, of the estate in question only, to the use of Sir R. A. the father for life, *sans* waste; remainder to the said Dame Mary, for life, for her jointure; remainder to Sir R. A. the son, and the heirs male of his body by Lovis Carteret his intended wife; remainder to the right heirs of Sir Robert the father.

By the second indenture (taken in the order as they stand in the verdict) the estate in question is bargained and sold by Sir Edward A. and Sir R. A. the father, to Sir Edward Carteret and John Lowe, for a year.

By the third indenture, Sir Edward A. and Sir Robert A. the father, in consideration of a marriage before that time had between Sir R. A. the father and Dame Mary his then wife, and of a marriage to be had between Sir R. A. the son and Lovis Carteret, and of her marriage portion, and for a provision to be made for Dame Mary, of a jointure, release the estate in question (*inter alia*) to Carteret and Lowe and their heirs, to the use of Sir R. A. the father for life, *sans* waste; remainder (except timber) to Dame Mary for life, for her jointure; remainder to Sir R. A. the son, and the heirs male of his body on the body of Lovis Carteret; remainder to the right heirs of Sir R. A. the father. (These are all the limitations in this indenture, concerning the estate in question.) Sir R. A. the father covenanted with Sir George Carteret (the father of Lovis C.) that for the better securing the estate in question to Sir Edward C. and John Lowe and their heirs, he and Dame Mary his wife and Sir Edward Atkyns would levy a fine to Carteret and Lowe and their heirs, to the uses before declared.

In Trinity Term 1669, a fine with proclamations was levied, of the estate in question (together with other estates) by Sir Edward A., Sir R. A. the father, and Dame Mary his then wife, to Sir Edward Carteret and John Lowe.

It is not found which of the two deeds was executed first (though it was a matter of fact): so that the priority of execution must be determined by the Court from circumstances and presumptions.

The order in which the two deeds stand in the verdict concludes nothing, one way or the other; since they are placed there as they were given in evidence.

Then he proceeded to compare the two deeds, and to reason upon them; and argued very elaborately, that either the little deed was executed after the great deed; or that the little deed was made with a view to control or correct the great deed; or that the great deed, and the little deed, and the fine, must be considered as one assurance (though not as incorporated, and as one single act): and in either

case, there is an end of the leasing power, and also of the jointuring power.

And he argued very strenuously, that the fine would extinguish both those powers; because they were powers appendant and annexed to Sir R. A. the father's estate for life, and not collateral to his estate.

2d Point. Second point or head—Supposing the great deed was last executed, or that it controls or corrects the little deed; then

Whether the leasing and jointuring powers were well executed by Sir R. A. the father.

He chose to say nothing as to the execution of the jointuring power; no circumstances attending the execution of it having been laid before the jury: but confined himself to the other (the leasing power).

Now this lease is void, as against law; being made for no other purpose than to restrain Sir R. A. the son from suffering a recovery. For that restraint is against law.

The power to suffer a common recovery is a privilege inseparably incident to an estate tail: it is a *potestas alienandi*, which is not restrained by the Statute *de Donis*, and has been so considered ever since *Taltaram's* case. [12 E. 4, 14 b., pl. 16.] And this power "to suffer a common recovery" cannot be restrained by condition, limitation, custom, recognizance, statute, or covenant.

That it cannot be restrained by condition, appears by Co. Litt. 223 b. 224 a., and *Sonday's* case, 9 Rep. 128.

That it cannot be restrained by limitation, appears by Cro. Jac. 696, *Foy* v. *Hinde;* and by *Sonday's* case, and other books.

That it cannot be restrained by custom, appears by the case of *Taylor* and *Shaw*, in Carter, 6 & 22.

That it cannot be restrained by recognizance or by statute, appears by *Poole's* case, cited in Moore, 810.

That it cannot be restrained by covenant, appears by the case of *Collins* v. *Plummer*, 1 Peere Wms. 104.

That an attempt to suffer a common recovery cannot be restrained, appears by *Corbet's* case, in the 1 Rep. 83; *Mildmay's* case, in the 6 Rep. 40; and the case of *Pierce* v. *Win*, in 1 Ventr. 321.

And that a conclusion to suffer a recovery cannot be restrained, appears by *Mary Portington's* case, in the 10 Rep. 35.

So that the question is reduced to this: "whether that can be effected by a lease made pursuant to a power which cannot be attained by a condition, limitation, custom, statute, recognizance, or covenant."

Since the law has been thus careful to preserve this incidental privilege of suffering a common recovery to a tenant in tail, surely it will not permit this new experiment, equally destructive to that privilege, to take place. This is the first attempt of the kind: and it is a sound rule of law, "that what never has been, ought not to be permitted."

The lease is also void, as being fraudulent: for it was made to deprive Sir R. A. the son of the profits of the estate, and of an incidental power over it. And the fraud which made it void was apparent. And as the estates affected by the lease subsisted before the lease was made, the lease was fraudulent at common law.

To prove the lease to be fraudulent, he relied on *Savile*, 126; the case of *White* v. *Bacon*, H. 32 Eliz. In a *formedon*, the tenant pleaded non-tenure: on which the parties were at issue. The jury found "that the tenant made a feoffment to several persons, to their own proper use, before the writ purchased; and that the feoffees never took the profits of the land; but that the feoffor took them until the day of purchasing the writ." And the doubt was, whether the feoffment was fraudulent, as against the demandant. And the judgment of the Court was, "that it was fraudulent and void." Now if the feoffee's not taking the profits, but the feoffor's taking them, was a reason for adjudging the feoffment to be fraudulent against the demandant in that case; the lessee's not taking the profits, not paying the reserved rent, nor having the lease in his custody, but the lessor's continuing in possession and taking the profits to the day of his death, seem in the present case to be full as cogent reasons for determining this lease to the Dacres to be fraudulent, against Dame Mary and Sir R. A. the son.

If this case should be answered by saying, "the feoffment therein mentioned was made void by 13 Eliz. c. 5, made against fraudulent grants," the reply would be "that that statute was made in affirmance of the common law;" as appears by *Twine's* case in the 3 Rep. 82 b. But he argued that the lease was fraudulent not only at common law, but

likewise by the statute. For the marriage of Dame Mary with Sir R. A. the father, and Dame Mary's releasing her former jointure, were a valuable consideration for the estate limited to Dame Mary for life: and the marriage-portion of Lovis Carteret was a valuable consideration, which extended to the limitation to Sir R. A. the son and the heirs male of his body by Lovis Carteret.

Here it hath been observed, "that if the lease had been called in question whilst it subsisted, it could not have been avoided; but would have been adjudged absolute, for the benefit of the lessees:" and 2 *Leon.* 132, *Moore* and *Savill*, and other books were cited as authorities to support the observation.

Answer—The objection to the lease is, "that it never did subsist," for the reasons which have been mentioned: and if the lease was void from the beginning, 'tis a contradiction to say "it shall be adjudged absolute." And the authorities cited are all of conditions subsequent to the estate created at the same time with the condition. In which cases there was no objection to the estate (for the estate was allowed to be well created); but the objections were to the conditions, which were subsequent to the estate.

It has been observed farther, "that the eyes of the Court do not pierce further than the shell of a conveyance; not to the design of the maker of it." Here indeed one must be at a loss for an answer, for want of knowing what the shell of a conveyance is. But there is one thing that appears upon this special verdict, which very much favours, if it does not directly establish, what we have been contending for: and that is the verdict which is found to have been obtained by Sir R. A. the son against Dame Ann the second wife of Sir R. A. the father: which verdict is a disaffirmance of the leasing and jointuring powers, and could not have been obtained if those powers had subsisted. 'Tis true, there is a deed found also in the special verdict, which was made between the death of Sir R. A. the father and the bringing the ejectment, and to which Sir R. A. the son is a party; in (*a*) which deed there is a recital "that Sir R. A. the son then claimed the estate in question, by and under the great deed:" which deed was not given in evidence on the trial of the ejectment. But this finding is

(*a*) The indenture tripartite, dated May 18th, 1710.

a matter of no moment: for the little deed was executed either before or at the time, or else subsequent to the time of executing the great deed. If it was executed subsequent to the execution of the great deed, then the little deed and fine control the great deed, by extinguishing the powers. If it was executed before or at the time of executing the great deed, then the two deeds and the fine may be taken as one assurance. And in that case, the little deed corrects the great one, by limiting the estate in question to Sir R. A. the father, discharged of the powers. And in either case it may be said, with great truth, "that Sir R. A. the son claimed under the great deed." However, supposing the person who drew the deed had mistaken the law, and made a false recital, surely a mis-recital of matter of law will not conclude a court of justice. And what Sir R. A. the son's own opinion upon the matter was, will appear by the recent pursuit of his title against Dame Ann; for Sir R. A. the father died in February 1709: and in Trinity Term following, Sir R. A. the son brought his ejectment against Dame Ann, who was then in possession of the estate under the jointuring power.

But it having been found, "that afterwards Dame Ann brought "an ejectment, and recovered the estate, upon two demises, one made by herself and the other by the surviving lessee for life;" it hath been insisted that Dame Ann could not have obtained that verdict, unless the two powers, or one of them at least, had then existed.

To which it may be answered, that it does not appear that the little deed was produced in evidence, upon the trial of that ejectment. Or perhaps the jointuring power only might then be in question: or there might have been other reasons for the difference in opinion. But however it might happen, still that verdict is not conclusive.

Here Mr. *Knowler* argued that the lease to the Dacres must have determined in 1711, upon the death of Sir R. A. the son without issue male: and that the lessor of the plaintiff was barred of his remedy by this action of ejectment (being an action grounded on an entry), because it was not brought within twenty years after his title accrued, and, consequently, his entry was not lawful, by 21 Jac. 1, c. 16.

But these parts of his argument are omitted.

Third point or head—But supposing the leasing and the 3d Point.

jointuring powers did exist, and were well executed by Sir R. A. the father; the matter which falls next under consideration is, "whether the lease or jointure made in execution of the powers, were an impediment to Sir R. A. the son's suffering the recovery."

The point we shall endeavour to establish is, that James Earle, the person against whom the writ of entry was brought, was tenant of the freehold when judgment was given against him in the common recovery. And we shall begin with observing that the jointure or the lease could be no impediment to Sir R. A. the son's suffering the recovery, because neither of the lessees or Dame Ann were in possession of the estates at the time when Sir R. A. the son made the feoffment to the said James Earle.

(*a*) If the Court should be of opinion, on the authority of 2 Anderson, 196, "that the livery under the letter of attorney of John Dacres vested the freehold in his co-lessees as well as in himself, and not in himself only," then we insist that the livery was void, because the lessees were in possession by the deed. For if tenant for life has a power to make leases for lives, and makes a lease for life by livery, the livery is void; because the lease takes effect by the deed: for by sealing the deed, the power is executed. 2 Levinz. 149, *Wigson* and *Garrett;* 1 Ventris 291, the Earl of *Leicester's* case. And the livery being void, the lessees were never in possession: for it is found by the verdict, "that the lessees or either of them were never in possession otherwise than by the livery."

And as the lease was no impediment, so the jointure could be none. For it is found, "that Dame Ann being in possession by virtue of the deed of appointment, and claiming the estate for her life for her jointure, an ejectment was brought on the demise of Sir R. A. the son and J. Walker his trustee, against Dame Ann and the tenants in possession for the recovery of the estate; and that there was a verdict for the plaintiff, and judgment on it:" and "that a writ of possession was awarded; and that soon after the judgment, and during the life of Dame Ann, Sir R. A. the son entered into and was in possession of the estates, and that he continued in possession to the day of his death." By this it appears that the jointure and possession of Dame Ann was removed out of the way.

(*a*) Note—Upon his first argument, he had urged (upon the authority of Bro. Abr. title *Feffements de terres*, pl. 67,) "that no freehold passed by the livery, to any of the three lessees, except John Dacres, who executed the letter of attorney to take it;" which John dying in 1705, the lease expired then. But he did not now insist upon this point, but seemed, rather, to give it up.

It can be no objection to the legality of Sir R. A. the son's possession, "that the judgment was not executed by a writ of possession;" since something equivalent to it is found, *viz.*, "that soon after the judgment, Sir R. A. the son entered into and was in possession of the estate." And there is no rule of law more uncontroverted, than "that a recoveror may enter without a writ of execution, where the demand is certain." The demandant after judgment in a common recovery may enter, or take out execution, at his election. *Shelley's* case, 1 Rep. 106; *Mary Portington's* case, 10 Rep. 38. Conusee may execute a fine executory (which does not take effect till execution) by entry. The plaintiff may have a redisseisin, on the Statute of Merton, c. 3, (which gives it after a recovery in an assize of novel disseisin and delivery of seisin by the sheriff,) as well where he executes the recovery by entry, as where the sheriff delivers seisin to him. The patron who recovers in *quare impedit*, may present without a writ to the bishop. Hutton 66, *Rudd* v. *Bishop of Lincoln.* And the lessor of the plaintiff may enter after recovery in ejectment. 2 Sid. 156. Sir Robert the son being thus in possession of the estate; and the possession which is found to have been in Dame Ann, having been removed, the effect and operation of the feoffment comes next in order to be considered.

But Mr. *Knowler* said, he would, out of the respect due to what came from the Court, take notice of an (*a*) intimation of one of their lordships, expressing a desire to hear it argued hypothetically, supposing the less deed to have been first executed, and supposing the powers to have subsisted and to have been well executed, and consequently that Sir R. A. the son was only tenant in tail in remainder; what would be the effect of the entry of such tenant in tail in remainder, under or in consequence of a judgment in ejectment?

(*a*) This had been intimated by one of the judges, at the end of the second argument.

And he hoped, he said, to make it appear beyond controversy, that Sir R. A. the son, after his entry in consequence of the judgment in ejectment, became tenant in tail in possession; *i. e.* became seised of an estate tail executed.

The gentlemen who have argued for the lessor of the plaintiff, have called the possession of Sir R. A. the son a naked possession. But he, to maintain his position, would show that the right of possession was in Sir R. A. the son.

There is a sound distinction in law between a naked possession and a right of possession. A disseisor has only a naked possession: the disseisee has the right of possession; for he may enter upon the disseisor. But when a descent is cast, the right of possession is no longer in the disseisee; but is in the heir of the disseisor: for the disseisee cannot enter upon the possession of the heir. So that a right of possession, and a right of entry, are convertible.

A judgment is an act of law: and whilst it continues in force, it destroys the title of the adverse party. A judgment in ejectment, by which only the possession is recovered, not only destroys the right of possession which was in the adverse party, but gives a right of possession to the recoveror. And if the judgment in ejectment did not produce this effect, the lessor of the plaintiff could not enter, or be intitled to the writ of *habere facias possessionem:* but his having a right to enter and to sue out that writ, infers his right to the possession. Whilst the judgment stands in force, it removes an intervening estate out of the way: and during that time, 'tis the same thing as if it had never existed. And the recoveror's right to the possession will continue till the judgment is reversed by error, or falsified in another action. Like the case where the tenant in tail suffers an erroneous recovery; so long as the recovery remains in force, it is a bar to the tail, and the issue in tail has no right to the estate tail: for if the tenant in tail should disseise the recoveror and die, the issue would not be remitted; because he has but one title to the land (which is the title by descent); and there must be two titles in the same person to make a remitter. Co. Litt. 349 a.

Now the consequence of this is, that the right to the possession and the remainder in tail meeting in the same person, and that person being Sir R. A. the son, the possession and the remainder in tail united, and Sir R. A. the son became seised of an estate tail executed, or (in other words) of an estate tail in possession.

If the nature of an action of ejectment, and the consequence resulting from a recovery in it, be considered, this will appear in a clearer light.

An ejectment is a possessory action; in which almost all titles to land are tried: whether the party's title is, to an estate in fee, fee tail, for life or for years, the remedy is by

one and the same action. In an action of ejectment, the plaintiff recovers only the possession of the land: and the execution is of the possession only. But if the lessor of the plaintiff recovers only the possession of the land, it may be asked, "how he becomes seised according to his title." To which it may be answered, that when a person is in possession by title (as every person is, who enters in execution of a judgment in ejectment, because the law does no wrong), the possession and title unite. For it is a rule of law, "That when a man, having a title to an estate, comes to the possession of it by lawful means, he shall be in possession according to his title:" as where the title is to have a fee, he becomes seised in fee; where the title is to have an estate tail, he becomes seised of an estate tail, and so on; the law casting the estate upon him according to his title. And were it not so, an ejectment would be the most ineffectual remedy for the trial of titles to estates: and it would never answer the purpose for which it was brought into use, if (as the counsel on the other side would have it) the lessor of the plaintiff had no more than a bare possession, after an execution or entry on a judgment in ejectment. But this is not all. For a great absurdity would follow, were it otherwise: a man would have a rightful possession, with an immediate remainder to himself in tail; a notion which never existed till this case came to be debated.

What is it that converts an estate tail in remainder into an estate tail executed, in any case? Certainly, nothing more or less than the possession's coming to the remainder in tail. For if there is tenant for life with remainder to a third person in tail, nothing comes to the remainder-man upon the death of the tenant for life but the possession: for the estate tail was in him before.

And whilst the estate tail continued executed, Sir R. A. the son made the feoffment to James Earle; which discontinued the tail, and vested a defeasible fee in him: and the præcipe, upon which the common recovery was suffered, being brought against him, and Sir R. A. the son being a party to the common recovery, as vouchee, the common recovery, thus circumstanced, barred the estate tail and the remainders over.

And though Dame Ann falsified the recovery in ejectment brought by Sir R. A. the son, by the judgment in

the ejectment afterwards brought by herself, yet that falsification had no other effect upon the estate, than to revive her right to the possession. Like the case just now cited, of an erroneous common recovery suffered by the tenant in tail, where, if the issue in tail reverses the common recovery by a writ of error, the reversal revives his title to the estate tail, and consequently he is then tenant in tail, by remitter. So that Dame Ann, by means of the recovery in the ejectment brought by herself, having the right to the possession, became tenant for life again, in possession; with a remainder in fee thereupon expectant to the recoveror in the common recovery, or to the person to whose use the common recovery was declared.

That estates may open and shut, or be spread and expand, as events happen, is not unusual in our law. If an estate is limited to A. for life; remainder to his first and other sons in tail; remainder to A. and the heirs of his body; till A. has issue, he is seised of an estate tail executed: upon the birth of a son, that estate opens, and lets in the son; and A. thereupon becomes tenant for life, with remainder to his son in tail. And this was *Lewis Bowle's* case, 11 Co. 80. So if lands are limited to all the children, either in possession, or remainder, upon the birth of the first child, the whole estate vests in him or her: upon the birth of another child, the estate opens and takes in that child; and opens in like manner on the birth of every other child. 1 Ld. Raym. 310, 311,—*Earl of Sussex* v. *Temple;* 2 Vern. 525, *Cook* v. *Cook.*

But the resolution of the question now under consideration does not altogether depend on the quantity of the estate which Sir R. A. the son had at the time when he made the feoffment. It depends on the quality of the conveyance he made use of.

All the gentlemen who have argued this case on the other side, have blended and confounded the several operations of different conveyances, and have not considered them with that distinction and precision that is necessary for the solution of the present question. If due attention were given to the operation of the several conveyances which the law has established, the seeming difficulties of this part of the case would be removed.

All conveyances operate as a feoffment, or as a grant.

A feoffment operates on the possession, without any regard to the estate or interest of the feoffor. A grant operates on the estate or interest which the grantor has in the thing granted. But, to be more particular; according to Lord Coke's enumeration, a man may purchase or convey lands by ten manners of conveyance: viz. by feoffment, grant, fine, common recovery, exchange, release, confirmation, grant of reversion with attornment, bargain and sale, will.

To make a feoffment good and valid, nothing is wanting but possession; and where the feoffor has possession, though it be as bare and naked as the gentlemen would have it, yet a freehold or fee simple passes, by reason of the livery. Poph. 39; Litt. § 595, 599, 611, 698; Co. Litt. 366 b, 367 a.

A grant passes nothing but what the grantor may lawfully grant. Poph. 39; Litt. § 608.

A fine and common recovery are likened to a feoffment; for one is called a feoffment of record, and the other is said to be in nature of a feoffment of record. That which occasions the likeness between a feoffment, fine, and recovery, is, that they all pass a fee, though the feoffor, conusor, or tenant have none. Co. Litt. 9 b. But, to give them this uniform operation, the conusor in the fine, and the tenant to the præcipe, must be seised of a freehold; *i. e.* an estate for life at least: otherwise, the fine may be avoided, by the plea of "*partes finis nil habuerunt;*" and the recovery, by the plea of non-tenure, *i. e.* "that the person against whom the writ was brought was not tenant of the freehold, by right or by wrong." By this, it appears that a fine and a common recovery are both void, for want of a freehold. But it nowhere appears, notwithstanding what has been urged, that an estate in the feoffor is necessary to support a feoffment. But it does appear, and I have a great authority for it, that it is no plea, in avoidance of a feoffment, to say, "that the feoffor has nothing in the land, at the time of the feoffment;" because the land passes by the livery. If the operation of the feoffment is questioned, the only plea is, "*N'enfeoffa pas;*" which puts in issue only the livery. This is the opinion and this is the language of Littleton; 10 Ed. 4. 8, 9.

All other conveyances, as exchange, release, confirma-

tion, grant of reversion, bargain and sale, will, pass nothing but what the grantor may lawfully convey, without livery; and, on that account, are in the nature of a grant. Litt. § 606, 607, 609, 610; Hardr. 410; *Edwards* v. *Slater*. It is the operation of these conveyances, that the gentlemen, in the course of their argument, have applied to a feoffment; but with what propriety, is submitted to the Court, upon what is now disclosed.

But it has been said, "that such a feoffment as this may be made by any person in possession; and if established, will introduce a new law in Westminster-Hall, contrary to all former rules and doctrines."

To which objection the answer is, "that it is most clear that a feoffment may be made by any person in possession;" for 'tis the doctrine the law teaches, and it has been the language of the greatest professors of it. Lord Coke, in his comment on the 25th chapter of W. 2, (which gives a writ of novel disseisin, where tenant for years aliens in fee, by feoffment,) grounds his distinction between cases which are within the act and cases which are not within the act on possession only. For he says, "Though the act speaks of an alienation by feoffment, by a tenant for years; yet it extends to tenant by elegit, statute-merchant, statute-staple, tenant at will, and tenant at sufferance, because all these have a possession; but it is otherwise of a bailiff, for he hath no possession at all." This shows how greatly one of the gentlemen is mistaken, when he asserts, "that a conveyance of an estate of freehold by a tenant at sufferance would be void," since it appears by the statute, and by the comment upon it, "that a feoffment by a tenant at sufferance (who has no more than a bare possession) will unquestionably pass a freehold." And the case of *Butler* v. *Buckmanton*, Cro. Jac. 169, proves no more than that the release of tenant in tail to a tenant at sufferance is not good, for want of a privity between them. Besides, a release, as has been already observed, passes no greater estate than the releaser can lawfully convey.

Lord Ch. Just. *Holt* lays it down as clear law, in the case of *Hunt* v. *Burn*, H. 1 Annæ, "that if lessee for years makes a feoffment with livery, though the lessor be on the land, protesting against it, yet the land passes, because the lessee was entitled to the possession." And Lord Ch. Just.

Holt is supported in his opinion, by the case of *Read and Morpeth* v. *Errington*, Cro. Eliz. 321, where the question was, "if a feoffment by lessee for years, the lessor being upon the land was a good feoffment;" for it was pretended, that his being upon the land guarded the land, so that no feoffment could be made. But the Court was of opinion that the feoffment was good, "because the lessee had the sole right to the possession, and livery ought always to be given to the possession."

Notice has been already taken, that it is no plea in avoidance of a feoffment to say, "that the feoffor had nothing in the land at the time of the feoffment." Let us here add the form of pleading a feoffment by tenant for life, and tenant for years; good pleading being an infallible test of the law. If feoffment in fee is pleaded by tenant in fee, the conclusion is, "that the feoffee was by virtue thereof, seised in fee;" and the same conclusion is made on the feoffment in fee of the tenant for life and tenant for years, "that by pretext thereof the feoffee was seised in fee." The entry of *Albany's* case in 1 Rep. 108 is a proof of this.

It appears by *Jenning's* case, in the 10th Rep. 43, "that the feoffee of lessee for years was a good tenant to the præcipe." In the case of *Smith* v. *Parkhurst*, or *Dormer* and *Fortescue*, it was admitted that there would have been a good tenant to the præcipe, if Mr. Just. *Dormer* had made a feoffment. And the question in Sir *William Pelham's* case, 1 Co. 14 b, is an admission "that the feoffment of lessee for years will pass a freehold."

"That possession only would support a feoffment," was the doctrine at Westminster-Hall in elder times. In *Perkins* (a book of no mean authority), section 200, it is laid down as a rule, "that without possession, a man cannot make livery." A feoffment by the lessee for years, though the lessor be upon the land, passes the land; and the reason for this is rendered in the book, "because the lessor had nothing to do with the possession."

It was the law, when lands were devisable only by custom, that a man might devise "that his lands should be sold by his executors." In which case, the lands descended upon the death of the testator to his heir at law, and the executors took no interest by the will. *Babington*, a learned judge, in putting this case, and taking notice of the feoff-

ment of the executors, makes this remark:—"And so," says he, "a man may have a lawful freehold from a person who had nothing in the land; as a man may have fire from a flint, which has no fire in it." And he further illustrates his conclusion with the instance, "that a woman shall recover her dower (which is an estate for life) against a guardian in chivalry, who has no freehold. 9 H. 6. 24."

In 10 H. 8. 10, it is mentioned as a thing notorious, "that those who have no freehold may convey a freehold." The conveyance which will pass a freehold from a person who has none, must necessarily be a feoffment, since there is no other conveyance in the law which will produce the like effect.

Before the statute of uses, a *cestuy qui use* conveyed the use by bargain and sale, and afterwards levied a fine to a stranger. And the question was, whether the fine was not void, as neither of the parties had anything in use or in possession; for by the bargain and sale, the use was in the bargainee; and nothing was in the bargainor, or in the stranger. It was argued that if this fine was not good, great inconvenience would follow; for that many recoveries had been suffered against the bargainor, after he had conveyed the use. To this *Fitzherbert* replied:—"It is the folly of purchasors that they do not take a feoffment from the *cestuy qui use*, before the fine is levied; for if they do, the fine will be good. I, for my part, says he, will never purchase any land without taking a feoffment; so that I may be in possession when the fine is levied; for then the fine will undoubtedly be good."—27 H. 8. 20. The possession here spoken of must be a freehold at least, because nothing less than a freehold will support a fine; for if neither conusor nor conusee have an estate of freehold in possession, remainder, or reversion, at the time of levying the fine, the fine is void. The feoffment here spoken of is the feoffment of a *cestuy qui use*, after he had parted from the use, and whilst the freehold and inheritance of the estate was in the feoffees, so that it was the feoffment of a person who had only a bare and naked possession (unaccompanied with right) to a stranger. The feoffment could not have been made good by the statute of 1 R. 3, c. 1; because, after the bargain and sale, the use was in the bargainee, and the feoffor was no longer *cestuy qui use*. This

was the opinion, and this was the practice, of one of the greatest lawyers of the age in which he lived; for it is said that Fitzherbert and Baldwyn were the greatest lawyers of that age. The observations upon the opinion of Fitzherbert are, that if a feoffment from the *cestuy qui use* to a stranger, after he had conveyed the use, would have made the fine undoubtedly good, the like feoffment would have made a good tenant to the præcipe; and for this plain reason, "because the feoffment passed a freehold." How would this great Judge have been surprised to have heard the operation of a conveyance which he relied on as the basis of his titles to his estates, doubted and debated! This case is an additional authority, "that the feoffment of a tenant at sufferance will pass a fee." For after the *cestuy qui use* had conveyed the use by bargain and sale, he was no longer a tenant at will to his feoffees. It is likewise a proof "that the feoffment of a deforceor, who is a wrongful withholder, passes a fee." For after the bargain and sale, the *cestui qui use* had no right to the possession, but was a wrongful withholder. Upon this, it is submitted, whether the confirmation of this doctrine, by the judgment of the Court, will introduce a new law into Westminster-Hall, contrary to all former rules and doctrines; or whether it will not rather revive a doctrine almost worn out of memory. It is so long since a feoffment was in common use, that it is no wonder the gentlemen should think the doctrine new, and that the properties of a feoffment should be so little known.

But it has been said, "that the feoffment of tenant in tail in remainder expectant upon an estate for life, will not make a discontinuance, though the feoffment was made with the consent of the tenant for life;" and for this the case of *Swift* v. *Heath*, Carthew 109, 110, was cited. This must be admitted; because a feoffment does not make a discontinuance, unless the tenant in tail is seised of the estate tail in possession. But does this case prove "that a feoffment by a remainder-man, with the consent of the tenant for life, is void?" Nothing less. The question, in the case cited, "whether the feoffment made a discontinuance," admitted the feoffment to be good; for the doubt was upon the operation of it.

To put an end to the question, there is a case, in which

it was determined, " that the feoffment of him in reversion or remainder, in the absence of the tenant for life, is a good feoffment." It is in Dyer, 340. The case was, that he in remainder in fee enfeoffed a stranger, in the absence of the tenant for life; who neither attorned nor assented to the feoffment, but occupied the estate during his life; and it was holden to be a good feoffment for the fee-simple. Where is the difference between this case and the present? In the case before the Court, was not the feoffment made by the remainder-man in the absence of Dame Ann, the tenant for life? Did she ever attorn or assent? And did she not occupy the estate during her life? The only difference that can be pretended between the two cases is, that in one, the remainder-man was tenant in fee; in the other, tenant in tail. But will that make any difference? 'Tis impossible it should; because the feoffment in both cases took effect by the livery.

It has been further said, " that Sir R. A. the son could not convey a freehold by a rightful conveyance, as by fine, release, or bargain and sale: and if not by a rightful, he could not do it by a wrongful one."

Here is a distinction made which was never met with. According to their notion of instruments of conveyance, a fine, release, and bargain and sale, are rightful conveyances; a feoffment, a wrongful one. Whereas it is most manifest, that all conveyances are in themselves equally rightful, and are to be made use of, according to the nature of the case to which they are applicable; and their being rightful, or wrongful, does not depend upon their names or their properties. That a freehold will not pass, by a fine, release, or bargain and sale, from a person who has only a bare and naked possession (for that is the subject we are now upon), does not proceed from those conveyances being lawful ones, but from the nature of those conveyances whose property it is to convey nothing but what the maker of them may lawfully convey; because they operate as a grant. Therefore, to infer from thence " that a freehold will not pass by a feoffment,"—a conveyance of a different operation, and whose property is to pass a freehold and fee, by force of the livery,—is an inconclusive argument.

Another observation has been made, " that if the law considers that some persons have this power, (to make a

feoffment,) and others have not, the law will never suffer that to be done by fraud, which cannot be done fairly and regularly."

Answer.—Every one who can get into possession has, and ever had, a power to make a feoffment; and the law makes no distinction of persons. And whenever a tenant in tail in remainder has obtained the possession (whether by right or by wrong), and has done an act, whilst in possession, to make a tenant to the præcipe, in order to suffer a common recovery; no instance can be produced, where such act has been adjudged fraudulent, unfair, or irregular.

It is very common, in practice, for tenant for life to surrender his estate to the remainder-man in tail, conditionally; in order to give the tenant in tail in remainder an opportunity to bar the estate tail and the remainders over: and though such surrender is a mere contrivance between the tenant for life and the remainder-man in tail, yet no common recovery was ever avoided on that account.

If tenant in tail in remainder disseises the tenant for life, and during the continuance of the disseisin suffers a common recovery, by their own admission, the common recovery is not avoidable by reason of the disseisin. So, where trustees, to preserve contingent remainders during the life of a tenant for years, have conveyed the freehold, to make a tenant to the præcipe, in order to give the remainder-man in tail an opportunity of suffering a recovery; there is no instance of such a recovery being set aside at law, upon a supposed practice between the tenant for years, the trustees, and the remainder-man in tail. And if a remainder-man in tail, who comes to the possession by a wrongful act, or by stratagem and contrivance, may make a tenant to the præcipe, in order to suffer a recovery; surely, a remainder-man in tail who comes to the possession by a lawful act, may do the same.

Where tenant in tail is party to the recovery as tenant or as vouchee, such recovery is not in the eye of the law either fraudulent or collusive; because the law has made the estate tail, and all the remainders, and the reversion expectant on it, subject to the pleasure of the tenant in tail, and given him a right to bar them all. If a reversioner expectant upon an estate tail could avoid a recovery suffered by the tenant in tail, as fraudulent, collusive, unfair,

or irregular, the law would have devised some means for avoiding it; and the reason why there are no such means is, because a reversion expectant on an estate tail is of no consideration in law. A reversion expectant on an estate tail is no assets. The reversioner cannot falsify a common recovery suffered by tenant in tail; neither is receipt given by the statute of W. 2, c. 3, to a reversioner on an estate tail. The reason of all this is, because the estate tail is an inheritance which may continue for ever. There is no provision by the statutes of 32 H. 8, c. 31, and 14 Eliz. c. 8, to preserve a remainder or reversion expectant on an estate tail, as there is when they are expectant on an estate for life, and the tenant for life is only vouched.

But Fermor's case, 3 Co. 78, has been objected; as if there was no difference between a fine or recovery by tenant for years, tenant for life, or a copyholder, by covin, to the intent to bar the reversioner or the lord of his inheritance; and a recovery suffered by tenant in tail, to the intent to bar the estate tail and the reversion.

It has been matter of surprise to hear the gentlemen mention the statute of 14 G. 2, c. 20. Because that statute is made in aid of recoveries, and not to invalidate them; and more especially, as there is a proviso in the act, "That it shall not be construed to prejudice or affect any question in law, which may arise upon common recoveries not remedied, or intended to be remedied, by it; but all such common recoveries are to remain, and be of such force and effect as they would have been if the act had not been made." Besides, there is a proviso in the act, "That no common recovery shall be called in question after twenty years."

The principal argument which the gentlemen have opposed to the doctrine which we have been endeavouring to support, may be reduced to the head of inconvenience; and they have argued upon it, as if the decision of the question depended on private opinion, and not on the law. But the question is not, "What inconvenience will attend the determination either way?" but, "What is the law?" The inconvenience (if there be one) arises from the nature and operation of a feoffment; and cannot be avoided, but by taking away that conveyance, or depriving it of an operation which it has been allowed to have by all the sages

of the law. But to do this, is not in the power of a Court of Justice; since no maxim of the common law can be abrogated or abolished, but by a legislative authority.

It was once thought to be a great inconvenience, "that a descent, immediately after a disseisin, should take away the entry of the person disseised." At another time, it was thought to be no small one, "that the son should lose his patrimony because he happened to be born out of time." And till lately, an heir might have been deprived of his family estate by the warranty of an ancestor who was never in possession of it.

The inconveniences occasioned by the maxims I have just now hinted at, were as great as that which is pretended to arise from the feoffment of a tenant in tail in remainder expectant upon an estate for life; and yet they continued through ages of the law, till the legislature took them away. The inconveniences which attended the law in those instances were as universal as any that can be suggested to follow from the doctrine we have been endeavouring to support; and yet Courts of Justice never thought themselves warranted to depart from the law.

Could the Courts of Common Law have determined "that a descent, after a recent disseisin, did not take away an entry," without determining, at the same time, "that a descent does not take away an entry?" Could they have determined "that a posthumous child should take, though the estate which was the support of the limitation to it determined before its birth," without resolving at the same time, "that a contingent remainder should take effect, though it did not vest during the continuance, or upon the determination, of the estate created for its support?" Or could they have determined, "that an heir should take an estate, notwithstanding the warranty of his collateral ancestor," without determining, "that collateral warranties did not bind?" And can the Court determine, in the present case, "that the recovery is void," without adjudging "that a feoffment has not the operation which it has had ever since it became a common assurance?"

When the law is doubtful, it is allowable to draw an argument from inconvenience; but where the law is clear and precise, (as it is, "that the feoffment of a person in possession, let him come to that possession how he will,

passes a fee,") an argument from inconvenience is not admissible; because it tends to undermine and overthrow the law.

Much has been said of disseisin; and many critical observations have been made upon that subject, in order to show that Sir R. A. the son could not be a disseisor. All that needs be said to them is, that Sir R. A. the son entered by right or by wrong (for there is no medium). And "that he entered and took the profits," is admitted. Now, if he entered of his own wrong, he was a disseisor, for he ousted the tenant for life; and if he was a disseisor, it is agreed there was a good tenant to the præcipe. If he entered by right, then (for the reasons already offered) he had power to make a tenant to the præcipe by his feoffment. So that, in either case, James Earle was a good tenant to the præcipe, at the time when judgment was given in the common recovery. And so he was warranted, he said, to conclude, that the recovery is good, and barred the estate tail limited to Sir R. A. the son; and consequently, the remainder in fee, which was limited to Sir R. A. the father, and by him devised to the lessor of the plaintiff.

4th Point. The fourth point or head.—Supposing the recovery to be good, whether the re-entry of Dame Ann, under the recovery and judgment in the second ejectment, did avoid it?

The gentleman who made this question, said, "it seemed to be of considerable weight." Whether it be so or not, we shall see presently. What he undertook to maintain was, "that the entry of Dame Ann, after she had recovered in the second ejectment, revested her estate for life and the remainder in fee, and put the estate in the same plight it was in before the common recovery was suffered." And to make this out, he compared the entry of Dame Ann to the regress of the disseisee, which avoids all intermediate acts by relation; and made that instance the foundation of his argument.

Mr. *Knowler* here observed, how inconsistent this argument of the gentleman was with his former. The direction and force of his argument under the last head was to show "that Sir R. A. the son entered by title, and could not possibly be a disseisor." The drift of this argument is to prove him to have been a disseisor. This shows how diffi-

cult it is to be consistent, when a person would reconcile matters not supportable.

The question is not to be determined by the rule or instance which the gentleman has applied to it; but upon this distinction,—"where the entire estate is defeated," and "where only part of the estate is defeated by one who has a prior title." The case which the gentleman puts, falls under the first member of the distinction; the present case falls under the second member of it.

The subsisting estate, at the time when Dame Ann entered under the judgment in the second ejectment, was an estate in fee in Robert Atkyns, the nephew and heir of Sir R. A. the son. All the interest that she could derive to herself by force of the judgment in the second ejectment was an estate for life; for she could recover no otherwise than according to her title. And therefore Dame Ann's entry under that judgment could have no other effect than to diminish and lessen the interest of Robert Atkyns, by taking out of it an estate for her life. This will appear by some instances which shall be mentioned.—Tenant for life surrenders his estate to the next remainder-man in tail, conditionally, to enable the remainder-man to suffer a common recovery. A recovery is suffered; and, the condition being broken, the tenant for life re-enters; the re-entry of the tenant for life will not avoid the recovery, and revive the estates that were barred by it. This appears by every day's experience. One of the gentlemen seemed to admit the law to be so, and accounted for it by saying, "It is because the tenant to the præcipe was made by force of a rightful estate." But that is not the reason. The true reason is (what has been already mentioned), "that only part of the estate is defeated by the entry of the tenant for life, and not the entire estate." A tenant for years, or by elegit, can avoid or falsify a recovery, during their particular estates only. A wife can avoid a recovery suffered by her husband alone, as to her title of dower only, and no further. Remainder-man in tail, expectant on an estate for life, disseised the tenant for life, and levied a fine with proclamations; the tenant for life entered on the conusee. And it was determined, "that notwithstanding the regress of the tenant for life, the reversion remained in the conusee, not defeated." And this was the case of *Okes* ex dimiss.

Lord Sturton, which is cited in Popham, 65, 66. Lessor disseises his lessee for life, and makes a lease for life to another: the first lessee re-enters; he leaves the reversion in the second lessee for life, who shall have the rent reserved on the first lease. Earl of *Gloucester's* case, cited in Sir *Moyle Finch's* case. More proofs might be brought, to confirm this part of the argument; but in so plain a case, these may suffice. And with them we may conclude, that the re-entry of Dame Ann under the recovery and judgment in the second ejectment, did not avoid the common recovery suffered by Sir Robert Atkyns the son.

And let it be observed, that the arguments made use of have not been drawn from general reasons and reflections, but have been suggested from authorities, and from the experience and practice of learned men.

Upon the whole, he prayed judgment for the defendants.

In reply—It was urged on part of the plaintiff—

1st Point.

1st, As to the great and little deeds—That the little deed did not revoke the greater one, or destroy the powers thereby given. Which was supported chiefly by arguments drawn from the deeds themselves.

2d Point. (*a*) Here is a like omission as to the argument concerning the validity and determination of the lease to the Dacres, as in the adverse argument.

As to the (*a*) lease to the Dacres being fraudulent, the case in Savile, 126, is not like the present: for here were express legal motives for making the lease; whereas there were none, in that case, for making the feoffment.

As to livery—It was not necessary, and therefore void. 1 Ventr. 291.

As to the recovery—The authorities are not *ad idem.*

Nor as to the feoffment. For this is a fictitious possession, and *in nubibus;* not an actual possession. No freehold is recovered in ejectment. So that Sir R. A. the son was not tenant in tail in possession, for want of the freehold. And without being tenant of the freehold, the recovery could not be valid. Mr. *Knowler* admits, "that the possession of the bailiff would not do." And surely this case is stronger than that of bailiff.

As to Cro. Jac. 169, the case of *Butler* v. *Duckmanton*, the possession of the tenant at sufferance was considered as no possession at all in that case. Therefore we may admit all Mr. Knowler's cases, because they do not come up to the present case of Sir R. A. the son's possession. Consequently, the remainder is not

affected by anything done under this nugatory possession.

Dame Ann was tenant of the freehold; and, without disseising her, there could be no tenant to the præcipe, who would be tenant of the freehold. Sir R. A. the son did not enter as a disseisor, but as having a title. And he had a title under the judgment to enter. And the estate which passed by the feoffment was according to his right. 2 Ro Abr. 5. Co. Litt. 52, b. And the warranty extended only to the fictitious title in ejectment. The possession only was transferred to him, not the freehold; and this was a mere naked possession, an accidental possession. Carthew, 110, proves that the remainders were not discontinued for want of a tenant to the freehold. Dame Ann was never out of possession of the freehold.

So that the estate which Sir Robert gained by his entry upon Dame Ann could not be an estate tail in possession; because there was a prior rightful estate for life in another person. Therefore it must be an estate tail in remainder.

It is asked, "when he first began to hold over unlawfully?" The answer is—From his first entry.

His entry was not wrongful; therefore he cannot be considered as a disseisor. But he held over unlawfully. 'Tis like a tenant by sufferance; or a man who enters upon the king, (who cannot be put out of possession,) or a man after the death of his wife, &c. And it is not easy to apprehend the distinction between entering "under the ejectment," and entering "in pursuance of the ejectment." Consequently, his was a mere naked possession, and the freehold remained undisturbed in Dame Ann.

As to the fraud and collusion of suffering a recovery.—There is surely such an insufficiency of estate in a tenant in tail in remainder, that he cannot suffer a common recovery. And surely the court will not permit a person who cannot be a tenant to the præcipe himself, to make a tenant to the præcipe. And they strongly urged the vast inconvenience that must attend this doctrine now advanced, "That a tenant in tail in remainder only, who can obtain a mere naked possession, may legally suffer a recovery, and bar the subsequent remainders."

Fourth point.—As to the re-entry of Lady Ann—The verdict did nothing; it is the entry that revests. It re- 4th point.

vested her estate, which was an estate for life. Whereas Sir R. A. the son's entry under his verdict only operated to give him a naked possession; he having no right to an estate tail in possession. And he could not be tenant in tail in possession to one purpose; and in remainder to another. Then her re-entry left him tenant in tail in remainder, as it found him.

In the case in 2 Ro. Abr. 421, title Remitter, letter 1, pl. 1, the wife entered under an act of parliament, which remitted her.

5th point. 5th point (as to the remedy).—The plaintiff is not barred of his entry, by the Statute of Limitations, 21 J. 1, c. 16; for the recoveree was not entitled to suffer a recovery; not being tenant in tail in possession.

As to Dame Ann's recovery in the ejectment brought by Miles, the demise was laid so far back as to overreach the whole term which Sir R. A. the son had recovered: it was laid so far back as to five days after the death of Sir R. A. the father. And her estate had never been discontinued; nor her right of entry taken away. So that Sir Robert the son was never tenant in tail in possession. The lessor of the plaintiff could not therefore enter till the jointure of Dame Ann was at an end, and her life-estate determined. Neither could he enter, so long as the lease to the Dacres was in being: which did not expire till the death of Thos. Dacres, the surviving lessee, on 23d July 1752.

Note—The last of the four arguments of this case was intended chiefly for the information of Lord *Mansfield*, who had not heard any of the former.

Before it came on, his lordship (having read the case, and seen notes of all the former arguments) sent for the counsel and agents on both sides, and told them that a point occurred to him, which did not seem to have been particularly attended to in drawing up the special verdict, and which he observed had been very little gone into in any of the former arguments; that it seemed to him material; and therefore he wished to have it spoken to: and he chose to apprise them of it beforehand, to avoid further expense and delay to the parties; because if he should defer mentioning it till after he had heard them in court, and if they should omit going fully into that point in their argument, and his lordship should continue to think it material, it must occasion a new argument.

The point was, " Whether, supposing the recovery to be bad, yet the plaintiff's ejectment was not barred by the statute of limitations?"

That depended, he said, upon many considerations which he desired them to think of; as, first, whether the lease was made pursuant to the power, or, (in other words,) whether the lease was void, as not being made pursuant to the power; (2dly) whether it was not determined upon the extinction of the estate tail in 1711; (3dly) whether, as this special verdict was found, an objection from the statute of limitations was now open to be made. And he mentioned some cases to them, which he desired them to look into.

Accordingly, upon this last argument, the said question was very fully discussed on both sides. But, to avoid prolixity, I have omitted to report these arguments of the counsel; because everything material upon this (*a*) point will appear from the following unanimous resolution of the court, given by Lord Mansfield.

(*a*) They fell under the 2d point.

Lord Mansfield now delivered the resolution of the court (having first stated the case and special verdict).

Sir Robert Atkyns the son being dead without issue male, the reversion in fee, devised to the lessor of the plaintiff, is come into possession; and, consequently, he must be entitled to judgment in this ejectment, unless the defendant can set up a bar to his right, or to his remedy by an ejectment.

They set up a bar to both.

In bar of his right, they insist upon the common recovery suffered in Hilary term, 9 Ann. A. D. 1710. In bar of his remedy, they insist upon the statute of limitations.

The common recovery, if duly suffered, certainly destroyed the right of the lessor of the plaintiff. The statute of limitations, if his title of entry accrued above twenty years before the 15th of December 1752, has certainly taken away the remedy by ejectment.

The merits, therefore, must depend upon two general questions.

1st, Whether the said common recovery was duly suffered.

2d, Whether this ejectment is barred by the statute of limitations.

First general question.

As to the first, the objection is, that there was not a good tenant to the præcipe; for Lady Atkyns, the widow of Sir Robert the father, had an estate for life in the premises, and did not join, by surrender or otherwise, in any conveyance of the freehold to James Earle, the tenant against whom the præcipe was brought. (There is no occasion to entangle this part of the case with the demise to the three Dacres.)

The defendants contend that there was a good tenant to the præcipe upon two grounds; first, because Lady Atkyns had no estate for life, and so Sir Robert the son was tenant in tail in possession. Secondly, suppose she had an estate for life, yet Earle was a good tenant to the præcipe, by disseisin: which they endeavour to prove two ways, *viz.* first, that Sir Robert Atkyns, by his entry, was himself a disseisor, and by his feoffment the 17th of January 1710 conveyed the freehold he had acquired by disseisin to James Earle; and secondly, suppose Sir Robert the son was not a disseisor, yet his said feoffment was a disseisin, and made James Earle a good tenant of the freehold by disseisin.

As to the first ground, "that Lady Atkyns had no estate for life," the whole argument depends upon this proposition, "that the lesser deed was executed after the greater deed; and, consequently, the power to Sir Robert Atkyns the father, to make a jointure, was extinguished by the fine levied in Trinity Term 1669." But the jury have not found the fact, "which was first executed." Both deeds bear the same date. They are both consistent. They are both manifestly but one agreement, executed by different instruments, to answer different purposes, and to suit (probably) the convenience of one party, who was interested only in a small part of the transaction.

The fine levied in Trinity Term 1669 pursued both deeds, and comprises all the premises in the greater deed, by which the powers were created.

It never could be the intent to revoke these powers at the instant they were created: by the lesser deed, which makes no mention of them; or by a fine levied agreeable to the greater deed, in which they are contained.

Sir Robert Atkyns, who survived the transaction above thirty years, has shown by many acts that he understood the powers to be well created and subsisting.

If it was necessary, we ought to presume the lesser deed first executed, to support the clear intent of parties, in a family settlement made for valuable consideration: for it is impossible to suppose they could really mean to revoke or extinguish these powers, and take this way of doing it. But, in this case, there is no room for presumption: the internal evidence of the thing itself speaks them to be one transaction; and the same, to all intents and purposes, as if expressed in one instrument.

As the jointress clearly had an estate for life, the next ground is, "that James Earle was a good tenant to the præcipe by disseisin."

The better to judge of this question, it may be proper to try to find out what the old law meant by a disseisin which constituted the tenant of the freehold, in respect of every demandant suing out a præcipe; although the owner's entry was not taken away. (For where the right of possession was acquired, and the owner put to his real action, there without doubt the possessor had got the freehold, though by wrong.)

All the law concerning disseisins, which is any way applicable to the present inquiry, existed and was in use and practice before the assize of novel disseisin. The assize was introduced (probably from the usage of Normandy, for the Grand Coustumier treats of assizes) in or before the reign of Henry the Second. Glanville, who wrote in that reign, calls the great assize a benefit, "*clementiam principis, de consilio procerum, populis indultam:* and the (*a*) Myrrour, fo. 93, says "Glanville introduced it."

(*a*) C. 2, § 25, p. 150; Edit. 1642.

Seisin is a technical term to denote the completion of that investiture by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass. *Sciendum est feudum, sine investitura, nullo modo constitui posse.* Feud. lib. 1, tit. 25; lib. 2, tit. 1; 2 Craig. lib. 2, tit. 2.

Disseisin therefore must mean some way or other turning the tenant out of his tenure, and usurping his place and feudal relation. At the time I speak of, no tenant could alien without licence of the lord. When the lord consented, the only form of conveyance was by feoffment publicly made, *coram paribus curiæ*, with the lord's concurrence. Homage, or fealty, was solemnly sworn; and suit of court and services were frequently done.

The freeholder represented the whole fee, did the duty to the lord, and defended the whole fee against strangers.

The freehold never could be in abeyance; because the lord must never be at a loss to know upon whom to call as his tenant; nor a stranger at a loss to know against whom to bring his præcipe. From the necessity of there being always a visible tenant of the freehold, and the notoriety who acted, and did suit and service as such, many privileges were allowed to innocent persons deriving title from the freeholder *de facto*.

If the disseisor died, after one year's nonclaim, the descent to his heir gave him the right of possession, and took away the true owner's entry. The stat. of 32 H. 8, c. 33, requires five years' nonclaim. The feoffee of a disseisor acquired title of possession, at the time I speak of, by one year's nonclaim. The descent to his heir remains privileged as it was at common law: for the 32 H. 8, c. 33, extends not to any feoffee of the disseisor immediate or mediate. Co. Lit. 256 a. The feoffee of a disseisor was favoured; because he came innocently into the tenure, by a solemn and public investiture, with the lord's concurrence.

(*a*) 18 E. 1. V. introduction to the Law of Tenures, f. 153 to 157.

But the statute (*a*) *Quia Emptores Terrarum*, (which took away subinfeudations, and gave free liberty of alienation to the tenants of subjects and to those who held of the king, as of an honour or manor,) and other statutes which extended the power of alienation to the king's tenants *in capite;* the frequent releases of feudal services; the statutes of uses and of wills; and at last the total (*b*) abolition of all military tenures, have left us little but the names of feoffment, seisin, tenure, and freeholder, without any precise knowledge of the thing originally signified by these sounds: the idea modern times annex to freehold, or freeholder, is taken merely from the duration of the estate.

(*b*) V. 12 C. 2, c. 23, and 13 C. 2, c. 7.

Copyholds, and the customary freeholds in the north, retain faint traces in imitation of the old system of feudal tenures. It is obvious how a man may visibly be the copyholder, or customary freeholder *de facto*, in prejudice of the rightful tenant. It is obvious, too, that usurping such copyhold or customary tenure is a different fact from a naked possession or occupation of the land.

But whoever will look into the practice of other countries, where tenures subsist with all the solemnities of feoffments

and seisins, upon every change of a tenant by descent or alienation, and upon every usurpation of the real right, will easily comprehend, that, at the time I speak of, it might be as notorious who was the feudal tenant *de facto*, as who is now *de facto* incumbent of a living, or mayor of a corporation.

Disseisin was a complicated fact, and differed from dispossessing. The freeholder by disseisin differed from a possessor by wrong. Bracton, (*a*) c. 2; De Assisa Novæ Disseysinæ, fo. 160, puts many cases of possession wrongfully taken, which he calls intrusion; because there is no disseisin: "*Possessio quæ nuda est omnino, et sine aliquo vestimento; quæ dicitur intrusio.*" *Vestimento* is seisin, investiture (from whence the Saxon term vest); a metaphor the feudists took from clothing: by which they meant to intimate, "that the naked possession was clothed with the solemnities of the feudal tenure." A particular tenant, according to feudal notions, was in as of the seisin of the fee, of which his estate was a part. If he aliened the fee (which he could only do by solemn feoffment, with the concurrence of the lord of whom the fee was held), he forfeited his particular estate, for having betrayed his seisin with which he was intrusted: but on account of the privity and confidence between him and the reversioner, and the notorious solemnity of the act of investiture, his feoffment disseised the reversioner.

(*a*) V. lib. 4, c. 1, 2.

Bracton, who wrote in the reign of Henry 3, (before tenants could alien without licence,) mentions the disseisin in this case as a necessary consequence, and as a thing which could not possibly be otherwise; c. 3, De Assisa Novæ Disseysinæ, 161 b, "*Item facit quis disseysinam, cùm quis in seysina fuerit ut de libero tenemento et ad vitam, vel ad terminum annorum, vel nomine custodiæ, vel aliquo alio modo; alium feoffaverit, in præjudicium veri domini, et fecerit alteri liberum tenementum; cum duo simul et semel, de eodem tenemento et in solidum, esse non possunt in seysina.*" He considers it as impossible for the true tenant not to be put out when the other actually came into his place.

So late as the 32d of Eliz. in the case of *Matheson* v. *Trot*, 1 Leon. 209, the distinction upon which the judgment turns is, "that Henry Denny gained a wrongful possession in fee, but did not gain any seisin, so no disseisor; therefore the descent to his heir is not privileged."

Nobody can disseise the king; neither can any one be disseised to the use of the king. The king may be wrongfully dispossessed: but the intruder's injurious possession is *sine aliquo vestimento*, and called intrusion. The king cannot be made a disseisor; not because it is wrong; (for he may, in fact, withhold the possession of land from a subject contrary to right;) but the reason seems, according to the feudal system, to be this: a subject never could stand in the king's seisin or tenure; and the king never could be in the seisin, tenure, or feudal relation of a subject. By that policy all real property was held, mediately or immediately, of the king: in the king himself all real property was allodial.

The precise definition of what constituted a disseisin which made the disseisor the tenant to the demandant's præcipe, though the right owner's entry was not taken away, was once well known, but it is not now to be found. The more we read, unless we are very careful to distinguish, the more we shall be confounded. For after the assize of novel disseisin was introduced, the legislature, by many acts of parliament, and the courts of law by liberal constructions in furtherance of justice, extended this remedy for the sake of the owner to every trespass or injury done to his real propety; if by bringing his assize he thought fit to admit himself disseised.

It lay against advisers, aiders, or abettors, who were not tenants. Co. Lit. 180 b. It lay against the tenant who was no disseisor; as the heir of a disseisor or his feoffee. Stat. Glocester. It lay for the owner, against the disseisor of the disseisor. The tenant's not being ready to pay a rent seck when demanded, was, for the benefit of the owner's remedy, a disseisin. Lit. § 233. It lay for outrageous distress. 2 Inst. 412. It lay against guardian, or particular tenant, who made a feoffment, as well as against their feoffees. 2 Inst. 413. The stat. of Westm. 2, c. 25, extends it to a man's depasturing the ground of another; or taking fish in his fishery. If one receives my rent without my consent, I may elect to make him a disseisor. Style, 407. If a guardian assigns dower to a woman not dowable, the owner may elect to make her a disseisoress. 24 Ed. 3, 43, (cited in Cro. Car. 203). In a word, for the sake of the remedy, as between the true owner and the wrong-doer, to punish the wrong; and as between the true owner and naked possessor, to try the title; the assize was extended to almost

every case of obstruction to an owner's full enjoyment of lands, tenements, or hereditaments.

The reports of assize can only relate to cases where the owner admits himself disseised.

The law-books treat of disseisin with a view to the assize; which was the common method of trying titles till ejectment came in use.

Littleton, who wrote long after the remedy by assize was enlarged by statutes and by an equitable latitude of construction, speaks of disseisins principally as between the owner and trespasser or possessor, with an eye to the remedy by assize.

These are the common places from whence many descriptions have been cited of a disseisin. But such authorities can give little light to the present question, which depends upon the nature of such a disseisin as made the disseisor tenant to every demandant, and freeholder *de facto* in spite of the true owner. Yet the definitions in the books (though very imperfect) savour often of that which originally was an actual disseisin in spite of the owner.

Littleton, in § 279, defines disseisin, with an &c.:— "Where a man enters into lands or tenements (where his entry is not congeable) and ousteth him which hath the freehold, &c."—The comment says, "every entry is no disseisin, unless there be an ouster of the freehold." And Co. Lit. 153 b, says, "disseisin is putting a man out of seisin, and ever implies a wrong: but dispossession or ejectment is putting out of possession, and may be by right or wrong. *Disseisin est un personal trespass de tortious ouster del seisin.*"

Though the term "disseisin" used happens to be the same, the thing signified by that word, as applied to the two cases of actual disseisin or disseisin by election, is very different. This distinctionof disseisin at election is made in the case of *Blunden* v. *Baugh,* Cro. Car. 303, of which case we have seen a manuscript report, fuller than the printed one. The three judges, with whom agreed the four judges of the Common Pleas, argued and held "that the lessee for years of the tenant at will was a disseisor at the election of the original lessor for the sake of his remedy; but never could be looked upon as the freeholder, or a disseisor in spite of the owner, or with regard to third persons." The manuscript report says, if a præcipe was brought against him, he

might say " I am not tenant to the freehold." A variety of like cases are put in Cro. Car. (to which I refer ——) : in the manuscript report there are more.

When the easy specific remedy was by assize, where the entry was not taken away, the injured owner might, for his benefit, elect to consider the wrong as a disseisin. So, since an ejectment is become the easy specific remedy, he may elect to call the wrong a dispossession.

Where an ejectment is brought, there can be no disseisin ; because the plaintiff may lay his demise when his title accrued, and recover the profits from the time of the demise. The entry confessed is previous to making the lease : but there is no real or supposed re-entry after the ejectment complained of. If it was considered as a disseisin, no mesne profits could be recovered without an actual re-entry.

If the lessee for life, or years, makes a feoffment, the lessor may still distrain for the rent, or charge the person to whom it is paid as a receiver, or bring an ejectment, and choose whether he will be considered as disseised. *Metcalf on the demise of Kynaston* v. *Parry and others ;* a case reserved at Salop assizes 25th March 1742, for the opinion of the court of Exchequer (who gave judgment in it on the 24th of November 1743), was this. Tenant in tail, of lands leased by his father, to a second son, for lives (under a power) upon his father's death received the rent from the occupier, as owner and as if no such lease had been made during his whole life. He suffered a common recovery. It was holden " that this was only a disseisin of the freehold at election ; and that therefore he could not make a good tenant to the præcipe :" and the recovery was adjudged bad.

Except the special case of fines with proclamations (which stands entirely upon distinct grounds), and the construction of the stat. of 4 H. 7, c. 24, for the sake of the bar, I cannot think of a case where the true owner, whose entry is not taken away, may not elect (by pursuing a possessory remedy) to be deemed as not having been disseised.

The consequences of actual disseisin, considered as such, continue law to this day. The disseisee cannot dispose or devise : the descent takes away his entry. There are two cases cited in the case of *Blunden* v. *Baugh* material to this point. *Pousley* v. *Blackman*, B. R. Trin. 18 Jac. Rot. 1230. Palmer 201, which is more fully stated in the manuscript

report, than in (*a*) Croke. The case (in effect and operation) was this. Tenant at will made a lease for years: the original lessor devised. Though the lease by tenant at will at the election of the original lessor was a disseisin, yet they adjudged his devise good; because he had not elected to admit himself disseised; and, by making a will, intimated the contrary.

(*a*) V. Cro. Jac. 659, S. C.

Another case (not in the report in Cro. Jac. but cited in the manuscript) was in the 14 Eliz., Sir Ambrose Cone, of his own head, entered into lands of Sir William Hollis, and paid Sir William afterwards a certain rent, claiming to hold as tenant at will, and died. His heir entered: upon whom Sir William entered. It was adjudged "that at the election of Sir William Sir Ambrose was a disseisor: but as Sir William had not determined his election before the death of Sir Ambrose, and entered upon his heir, it was no disseisin; and, consequently, the descent no bar to his entry."

In the case of *Pousley* v. *Blackman*, Palmer 205, it is said, "if a disseisee devise, and afterwards enter, the devise is good;" which Dodderidge denied, and said there must be a new publication; which seems right, if there ever was a disseisin: for, where an actual entry is necessary, it will not make good a conveyance made before; as was holden in B. R. & Dom. proc. in the case of (*b*) *Berrington* v. *Parkhurst*. The actual entry could not support the lease made before. Yet in (*c*) Salk. 237, it is agreed, "the devise is good, because he was seised *ab initio*, so as he might bring trespass:" *i. e.* he never was disseised at all by his election: and he might make that election without an entry; he might bring his ejectment, he might bring trespass, without a re-entry. If it was not for this doctrine of election, what a condition would men be in!

(*b*) May 1738.

(*c*) 1 Salk. 237, *Bunter* v. *Coke*.

In the case of *Pousley* v. *Blackman* there was no entry: and after much argument it was at last resolved unanimously by the whole court, from the inconveniences which would be introduced if a lessee by a secret contract with a stranger could defeat the will of his lessor, "that the devise was good." And in the manuscript report where it is cited, one point said to have been resolved, is "that the owner, by making a devise, showed his election not to be disseised."

I will now consider whether James Earle can be deemed a good tenant of the freehold by disseisin.

Disseisin is a fact. It is not found: all the jury say is, "that soon after the judgment in ejectment Sir Robert entered and was in possession." This must be taken to be an entry in consequence of the judgment; it was so considered upon settling the special verdict: otherwise the defendants have no case; for it is not found that Lady Atkyns was ever ousted, or quitted the possession, or that Sir Robert ever was seised.

Taking possession, under a judgment in ejectment, never could be a disseisin of the freehold.

Suppose it a real proceeding—the termor of a disseisee might, at the old law, recover against the disseisor: he might recover against the feoffee of his lessor; but he never could thereby become a disseisor of the freehold: he never could be other than a termor, enjoying in the nature of a bailiff, by virtue of a real covenant. In respect of the freehold, his possession enured always by right, and never by wrong. If the lessor had infeoffed, it enured to the alienee; if the lessor was disseised and might enter, it enured to the disseisee; if his entry was taken away, it enured to the heir or feoffee of the disseisor, who in that case had the right of possession.

Suppose the proceeding (as it is) a fictitious remedy: then in truth and substance a judgment in ejectment is a recovery of the possession (not of the seisin or freehold), without prejudice to the right, as it may afterwards appear, even between the parties. He who enters under it in truth and substance can only be possessed according to right, *prout lex postulat.*

If he has a freehold, he is in as freeholder. If he has a chattel-interest, he is in as a termor; and in respect of the freehold, his possession enures according to right. If he has no title, he is in as a trespasser; and, without any re-entry by the true owner, is liable to account for the profits.

It is found, that the ejectment was brought by Sir Robert Atkyns to recover the possession: but it is not found that he claimed the freehold.

The title must now be taken as in this special verdict. Therefore it appears he had no right to the possession. His feoffee could be in no other condition than himself: he had a possession without prejudice to the right; and could convey no other. He was not in as a particular tenant;—

there was no privity of any seisin;—he had only a naked possession.*

But the case is still stronger. The true owner cannot even elect to make a person in possession under a judgment in ejectment a disseisor. He could not bring an assize of novel disseisin: the entry is not *injustè et sine judicio*, but under authority of a court of justice and lawful; therefore not liable to punishment by fine (as every disseisin was).

The true owner may enter upon a disseisor: but after a judgment in ejectment an actual entry would not be permitted. If there had been any election in this case, the

* With reference to this part of the judgment, the reader is requested to peruse the celebrated note of Mr. Butler, 1 Inst. 330 b, where the learned editor controverts Lord Mansfield's doctrine, and argues that livery of seisin, made by any person having the possession, necessarily transferred the freehold.

With regard to the meaning of the word *disseisin*, here so much canvassed by his lordship, it certainly has been used by the courts and text writers in senses so various as to create a good deal of embarrassment. It is used sometimes to denote a *disseisin at election;* sometimes *the acquisition of a tortious freehold;* and in the latter sense it seems sometimes to be applied to denote any acquisition of a tortious freehold; at other times to bear the confined meaning of the acquisition of a freehold by tort, by means of an entry on and *ouster* of the former freeholder: thus in *Reading* v. *Royston*, Sal. 423, it is laid down that "the statute of limitations never runs against a man but where he is actually *ousted or disseised;*" a proposition obviously untrue, if we were to understand *disseised* in the confined sense: since it is manifest that the statute ran in every case where a tortious freehold was acquired by abatement or intrusion. On the other hand, the word *disseisin* is frequently used in the confined sense; for instance, in Sir William Blackstone's Commentaries, where, in conformity to Co. Litt. 277 a, it is explained to be "an attack on him who has the real freehold and turning him out of it;" and Sir William expressly distinguishes it from *abatement* and *intrusion*, saying, "Those were an *ouster* from a freehold in law, this is an ouster from a freehold *in deed*," Acc. 1 Inst. 277 a. Numerous other examples might be given in which the word *disseisin* is used in the *general* sense, and as many in which it is used in the *confined* sense.

This species of confusion seems to have proceeded from the etymology of *disseisin*, which being compounded of the privative particle *de* and the word *seisin*, signifies nothing more than *to put out of the seisin*, whether in law or in deed, whether with force or without force. And such being the etymology of the word, law writers appear very early to have made use of it as a *nomen generale* comprehending every particular mode of interference with the seisin; thus in 1 Roll. 659, l. 15, it is stated that "if a man *disturbs the entry* of him who has right unto land, it will be a *disseisin*." Yet this will include the cases of *abatement* and *intrusion*. Thus, too, any one reading the chapter of the 1st Institute upon *releases*, will find many things predicated there of *disseisor* and *disseisee*, which must be meant to apply to every person wrongfully acquiring or put out of a freehold. And, indeed, Lyttleton himself seems to have been conscious of this; for when he undertakes to define *disseisin* at sect. 279, he says, "*Nota, que disseisin est properment l'ou un homme entra en aucuns terres ou tenements l'ou son entry n'est pas congeable et ousta celuy que ad franktenement.*" It is clear from his use of the word *properment* that he was conscious of some other sense in which the word was used, though perhaps not "*properly*" so. And indeed this seems to have been so almost *ex necessitate;* for I am not aware that such a word, for instance, as *abatee* ever existed by which the character of the heir or remainderman abated or intruded on could have been denoted. Now the above consideration reconciles very many of the apparent discrepancies in the books regarding the necessity of a disseisin in order that the time of limitation might begin to run; for taking the word *in its general sense* it would be true, as laid down in *Reading* v. *Royston*, that the statute never ran against a man but when he was actually *ousted* or *disseised:* and taking it *in its confined sense*, it would be also true, as stated by Lord Ellenborough in *Doe* v. *Perkins*, that in order to constitute a title by *disseisin* there must be a wrongful *entry*, but that a wrongful *continuance* in possession is no disseisin. Whereas, in 1 Roll. 659, it is laid down, that "if guardian *continue* possession after the full age of his ward, he will be a disseisor." A passage which is the more remarkable, because Lord Coke at 1 Inst., 57 b, calls the same person an *abator*.

true owner elected " not to be disseised," and recovered by ejectment: which, if there had been a disseisin, would have purged it.

But there is still behind (though it happens not to be necessary) a larger ground upon which to determine this question, and more satisfactory, because more intelligible; from the nature of a common recovery now, and a feoffment to make a tenant to the præcipe with that view only.

The sense of wise men, and the general bent of the people in this country, have ever been against making land perpetually unalienable. The utility of the end was thought to justify any means to attain it.

Nothing could be more agreeable to the law of tenures than a male fee unalienable. But this bent " to set property free " allowed the donee, after a son was born, to destroy the limitation, and break the condition of his investiture.

No sooner had the statute de Donis repeated what the law of tenures said before, " that the tenor of the grant should be observed," than the same bent permitted tenant in tail of the freehold and inheritance to make an alienation, voidable only under the name of a discontinuance. But this was a small relief.

At last, the people having groaned for 200 years under the inconveniences of so much property being unalienable; and the great men, to raise the pride of their families, and (in those turbulent times) to preserve their estates from forfeitures, preventing any alteration by the legislature;—the same bent threw out a (*a*) fiction in *Taltarum's* case; by which tenant in tail of the freehold and inheritance, or with consent of the freeholder, might alien absolutely.

(*a*) Pigot of Common Recoveries, p. 7, 8, 9, 19.

Public utility adopted and gave a sanction to the doctrine, for the real political reason " to break entails:" but the ostensible reason, " from the fictitious recompense," hampered succeeding times, how to distinguish cases which were within the false reason given, but not within the real policy of the invention. 'Till at last the legislature applauded common recoveries, and lent their aid by the acts of 11 H. 7, c. 20; 33 H. 8, c. 31; 34 & 35 H. 8, c. 20; 14 Eliz. c. 8; and lately 14 G. 2, c. 20 (which is a retrospective and declaratory law, and seems to have restored the original tenant to the præcipe). Before the statute of *Quia Empto-*

res Terrarum, subinfeudations, whereupon rents and services were reserved, did not prevent the præcipe's lying against the freeholder of the seignory. When common leases to farmers, for one or more life or lives, reserving rent, came in use, they, for that purpose, resembled subinfeudations, and ought not to prevent the præcipe being brought against the owner of the freehold under which such leases were granted.

As the legislature has for ages avowed the proposition, we may now say, "that common recoveries are a mere form of conveyance." All necessary circumstances of form and ceremony are taken from its fictitious original.

The policy of this species of alienation meant to take a middle way as to entails, between perpetuities and absolute property.

Alienations were allowed, yet in such a shape as necessarily required deliberation and delay: and they were only allowed to be made by tenant in tail in possession, or by tenant in tail in remainder, with consent of the owner of the first estate for life. The eldest son was restrained in the lifetime of his father, or mother, or any other ancestor or relation, seised for life under a family settlement.

The Act of 14 G. 2 proceeds upon the parties to a recovery having power to suffer it. Sir Robert Atkyns the son had no right to suffer a common recovery without the concurrence of the jointress. Any contrivance to do it without her joining is artifice and evasion.

If tenant in tail in possession is disseised, though the præcipe be brought against the disseisor, yet, if he is vouched, the recovery shall bar; because he had power to bar.

In *Lincoln* College case, 3 Co. 59, the judges support the collateral warranty of Sibil; because she and Edward had power to bar.

In *Jenning's* case, 10 Co. 44, the recovery is supported, because the parties had power.

By parity of reason, this recovery ought not to be supported, because the parties had no power: if it was, the law must be overturned.

Every remainder-man in tail might easily get a naked possession, and make a secret feoffment.

The plan of marriage and other family settlements, is "to limit a remainder to the first, and every other sons in

tail." The negative which the father now has upon the eldest son's suffering a common recovery, is the very means and consideration of getting the estate resettled upon the marriage of the eldest son. By this method the moment he attains to the age of twenty-one years, he may set his father at defiance, suffer a common recovery, and bar all the rest of the family. This consequence alone, in a case unprecedented, is a sufficient objection.

When a termor, after the 4 H. 7, made a feoffment, and levied a fine with proclamations, and insisted upon five years' nonclaim, the judges, with strong sense, said, though a feoffment by tenant for life, or years, or at will, is a disseisin; it shall not operate as a disseisin to enable the termor himself to bar the inheritance by a fine with proclamations according to the 4 H. 7, c. 20; for, say they, "it was never the intent of the makers of the act that those who could not levy a fine, should, by making an estate by wrong and fraud, be enabled to bar those who had right. For if they themselves, without such fraudulent estate, could not levy a fine to bar them who had the freehold and inheritance, certainly the makers of the 4 H. 7, c. 20, did not intend that by making of an estate by fraud and practice, they should have power to bar them: and such fraudulent estate is as no estate in the judgment of the law." So say I, in the present case. It was never the intent that those who could not suffer a recovery, should, by making an estate by wrong and fraud, be enabled to bar those in remainder or reversion who had right. For if they themselves, without such fraudulent estate, could not suffer a recovery to bar those in remainder and reversion, certainly the framers of this qualified species of alienation did not intend that by making an estate by fraud and practice they should have power to bar them: and such fraudulent estate is as no estate in the judgment of the law.

The judges then put many cases, where a recovery in dower, or other real action; a remitter to a feme covert, or an infant; a warranty; a sale in market overt; the king's letters patent; a presentation; an administration;—in short, all acts temporal and ecclesiastical, shall be avoided by covin: and from thence argue that a fine which the parties had no power to levy directly, shall not be supported indirectly by covin. So argue I, in the present case: a

common recovery which the parties had no power to suffer directly, shall not be made good by wrong and fraud.

In the spirit of the makers of the 14 G. 2, I say the parties to this recovery had not power to suffer it: therefore it is substantially bad.

This is not the case of a feoffment to a third person for his own benefit: it is, in effect, to the use of Sir Robert, the wrong-doer, himself. The law considers a feoffee to the intent to be tenant to the præcipe as a mere instrument for one purpose of form only. His wife shall not be endowed; his statutes or judgments shall not affect the land; if he had a term for years it shall not merge. Let me appeal then to the oldest authorities, in those times when the solemnity and notoriety of feoffments and the feudal veneration in which they were held, gave them all that wonderful efficacy we read of: could a man, by his own injurious feoffment, have acquired an advantage to himself? Littleton shall answer: he tells us what was established long before he wrote. Lit. § 395. "If a disseisor infeoff his father in fee, and the father die seised of such estate, by which the lands descend to the disseisor as son and heir, &c.; in this case, the disseisee may well enter upon the disseisor, notwithstanding the descent: for that as to the disseisin, the disseisor shall be adjudged in but as a disseisor, notwithstanding the descent; *quia particeps criminis.*"

After the statute de Donis, tenant in tail in remainder, with the concurrence of the freeholder, might make a voidable alienation by discontinuance; but he could not acquire to himself that privilege by an injurious entry and feoffment. "He in remainder in tail disseises tenant for life, and makes a feoffment, and dies without issue, and the tenant for life dies; he in reversion may enter: it is no discontinuance." Co. Lit. 347 a, b. It is no disseisin of the reversion. "If remainder-man for life disseise the immediate tenant for life, after the death of the immediate tenant he is in as tenant for life." Neither should a reversioner, by an injurious entry upon the tenant for life, be, in respect of strangers, allowed to transmit to his heir the privilege of descent. If the reversioner disseises tenant for life, and dies seised, the descent shall not take away the entry of a stranger. Hob. 323.

From the whole we may conclude—if, before the intro-

duction of common recoveries as a conveyance, this question had been agitated in an adversary real action, upon a plea "that Earle was not tenant of the freehold," it would have been adjudged, from the law and artificial learning of tenures, "that he could not be so considered." If the question had been, "whether tenant in tail in remainder should, by such injurious entry and feoffment, acquire a benefit to himself to the prejudice of his reversioner, it would have been adjudged, from eternal principles of justice, "that an act founded in wrong should not, by virtue of the crime itself, become legal for the author's advantage."

As it is now agitated, when common recoveries are established, as a species of alienation, the only question is, "whether the rule of law which requires the concurrence of the owner of the first estate for life shall be overturned." 'Tis better to subvert the rule directly, than suffer it to be done by a secret injurious entry and feoffment; which cannot be prevented, and which the owner may never hear of.

There is no injury or wrong for which the law does not provide a remedy. But if this stratagem should prevail, redress must follow too late; unless the entry of the tenant for life shall avoid the recovery. If it would, there is an end of the present question: for the jointress entered, and was intitled to the profits from Sir Robert Atkyns as a trespasser *ab initio.*

In every light, and upon every ground of law, this recovery is bad.

As there is no bar to the right of the lessor of the plaintiff—

Second general question.

The second general question is, "whether the lessor of the plaintiff is, by the Statute of Limitations, barred from recovering in this ejectment?"

This point was certainly not insisted upon at the trial, and therefore the special verdict is not adapted to it. The abstruse learning, upon which the validity of the common recovery depended, might engross the whole attention at the trial: and the special verdict having no facts (which easily might have been found) particularly applicable to an objection from the Statute of Limitations, might occasion the question not having been made at the bar till the last argument. The point however is certainly open upon this special verdict.

An ejectment is a possessory remedy, and only competent where the lessor of the plaintiff may enter; therefore it is always necessary for the plaintiff to show that his lessor had a right to enter; by proving a possession within twenty years, or accounting for the want of it, under some of the exceptions allowed by the statute. Twenty years' adverse possession is a positive title to the defendant: it is not a bar to the action or remedy of the plaintiff only, but takes away his right of possession.

Every plaintiff in ejectment must show a right of possession as well as of property; and therefore the defendant needs not plead the statute, as in the case of actions.

The question then is, whether it appears upon this special verdict, "that the lessor of the plaintiff might enter when he brought this ejectment."

On the 9th of November 1711, Sir Robert Atkyns died without issue male.

On the 9th of October 1712, Lady Atkyns, the jointress, died. Then accrued the title of entry of the lessor of the plaintiff. His only excuse for not entering is, "that he was prevented by the said lease of the 31st of May 1698 to the three Dacres." That upon the death of Thomas Dacres the surviving lessee, on the 23d of July 1752, a new title of entry accrued; upon which he entered on the 15th of December 1752, and brought this ejectment.

Three answers are given; any one of which, if well founded, is sufficient.

1st. That the said lease was absolutely void, and of no effect.

2d. If good, it determined by the estate tail being spent, by the express tenor of the demise.

3d. If subsisting, yet, upon the extinction of the estate tail, it was a trust to attend the inheritance in the lessor of the plaintiff, and made part of his title deeds: therefore could not stop the statute's running to protect an adverse possession, nor give him any new right of entry.

First. That the lease was void.

1st answer to the excuse for not entering.

Sir Robert Atkyns the father being only tenant for life, could, by virtue of his ownership, make no estate to continue after his death. This lease, therefore, after his death, can only be supported by his power, if it was made pursuant to it.

" Whether it was made pursuant to his power," is the question.

The limitation and modifying of estates, by virtue of powers, came from equity into the common law with the Statute of Uses. The intent of parties who gave the power ought to govern every construction. He to whom it is given has a right to enjoy the full exercise of it: they over whose estate it is given, have a right to say " it shall not be exceeded." The conditions shall not be evaded; it shall be strictly pursued in form and substance: and all acts done under a special authority, not agreeable thereto, nor warranted thereby, must be void.

Of all kinds of powers, the most frequent is that " to make leases." For the encouragement of farmers to occupy, stock, and improve the land, it is necessary they should have some permanent interest. Unless the owner of the estate for life was enabled to make a permanent lease, he could not enjoy to the best advantage during his own time; and they who come after must suffer by the land being untenanted, out of repair, and in a bad condition. The plan of this power is for the mutual advantage of possessor and successor. The execution thereof is checked with many conditions to guard the successor, that the annual revenue shall not be diminished; nor those in succession or remainder at all prejudiced in point of remedy or other circumstance of full and ample enjoyment.

There are two methods of leasing in common use in this kingdom,—at the best rent, and upon fines: which, as the lives or leases drop, are considered among the annual profits. This power is always adapted to both. It is inserted in almost every strict settlement of every kind. It is inserted in the greater deed of the 12th of June 1669, and given indiscriminately to Sir Robert the father, Sir Robert the son, and Lovis his wife.

The nature and view of a power so usually given is well understood; and courts of justice have always looked with a jealous eye to see that the conditions in favour of the next taker be pursued; not literally only, but substantially. It is not sufficient that the ancient rent be reserved; it must be reserved with all the beneficial circumstances. If payable before at four, it cannot be reserved at two payments. Lord *Mountjoy's* case, 5 Co. 3 b. The whole rent must be

payable annually during the whole term. In that case, it was holden that less could not be reserved even to the lessor himself during his own life.

One of the reasons in *Elmer's* case, 5 Co. 2, shows the rent must be payable annually during the term.

In the case of *Lady Charlotte Orby & al'* v. *Lady Mohun*, 2 Vernon, 531, 542, Lord *Cowper*, *Holt*, and *Trevor*, all three held clearly, that a lease "reserving the best rent," though good against an owner of the inheritance, was void under a power; and *Cowper* and *Trevor* held, that reserving "the ancient rent," where lands had been usually demised, though good and certain enough by reference against an owner of the inheritance, was void under a power; because it put the remainder-man under difficulties in avowing.

"The intent was," say they, "that the tenant for life in possession might lease: so it was, on the other hand, that the revenue should not be diminished, but the ancient rent at least reserved; and in such beneficial manner as might with certainty and without any difficulty be recovered."

"The question here is not," say they, "whether the lease is void for incertainty, as between the lessor and lessee, but whether all requisites are observed, and such beneficial clauses and reservations as ought to have been, for the benefit of a third person, the remainder-man."

In the case of the *Earl of Cardigan* v. *Montague*, 6th June 1755, a decretal order on the master's report; the Duke of Montague, tenant for life, without impeachment of waste, had power to lease, reserving ancient rent where usually demised, and best rent where not usually demised: he made twenty-four leases. The master's report, as to many of the leases, which he reported bad, was submitted to; as where ancient covenants "to grind at mills, or to pay land-tax," were not in the new lease,—where some part not within the power is included in the lease,—where many manors were included in the lease, reserving a sum certain as the best rent, which laid the remainder-man under difficulties to find out whether it was the best rent or not. As to five of them, which the master reported to be good, exceptions were taken. Their validity turned upon this case. The words in the power were, "reserving ancient, usual, and accustomed rents, herriots, boons, and services." In the former leases the tenants covenanted "to keep in repair:"

that covenant was omitted in this. The *Lord Chancellor* was of opinion that that covenant was a boon, and beneficial to the remainder-man; and held these leases void for want of it. He took some days to consider; and declared he was clear upon the argument, but took time, because there was no case in point. The more he thought of it, the more he was convinced. The principle he rested upon was, that the estate must come to the remainder-man in as beneficial a manner as ancient owners held it.

I have gone so far at large into the general doctrine, not from any difficulty, but because the point is of so much consequence to the lessor of the plaintiff. For this writing of the 31st of May 1698 has not colour enough to make a question.

1st. It is no lease at all. The very definition of a lease is a contract between landlord and tenant, by which both are bound in mutual stipulations.

A sale and lease are defined to be the same species of contract. A sale cannot be, unless somebody agrees to pay the price; nor can there be a lease, unless somebody agrees to hire and to pay the rent. This writing purports to be such a contract. It is an indenture, which implies reciprocal instruments, tallying one with the other. It professes being made by Sir Robert Atkyns on the one part, and the three Dacres on the other part. But it is not: the Dacres are not bound: they never executed this or any counter-part. It does not appear they knew or consented to the making of it.

Livery of seisin was immaterial. A lease by virtue of a power, takes effect out of the settlement that gives the power. But John Dacres, who gave the letter of attorney to take livery, died in 1705. Robert died in 1706. Sir Robert Atkyns the father lived till 1709. Suppose, at his death, £360 a year a beneficial rent: those in remainder could not demand it. Thomas Dacres had not executed the lease; he had not accepted it; he never had entered under it; no distress could be taken from him; no action could be brought against him.

One man cannot oblige another to be his tenant at a high rent without his consent. This is so plain, that on the part of the plaintiff they have argued that Thomas Dacres was bound by acceptance three ways:—

1st. Because livery of seisin was taken in the name of John, Robert, and Thomas.

Answer: Thomas gave no authority so to do: it does not appear that he knew of it. But the mere taking livery of seisin, if he never entered or occupied, would not be sufficient to charge him with the rent reserved.

2d. In the ejectment brought in Hilary Term 1711, a demise was laid from Thomas Dacres, as well as the jointress, and the plaintiff had judgment to recover "*separales terminos.*"

Answer: The two titles are inconsistent; so there could not be really a recovery upon both. But the judgment pursued the declaration, and was mere form. It does not appear that Thomas Dacres knew his name was made use of; and he never entered or took possession.

3d. That acceptance shall be presumed. And it is compared to grants; and *Thompson* v. *Leach* is cited. [V. 3, Lev. 284.]

Answer: The ground of *Thompson* v. *Leach*, and of all the cases there put, is, "that a gift imports a benefit; and consent to receive a bounty may fairly be presumed till the contrary appear." But the offer of lands to a substantial man at a rack rent does not import such benefit, as nobody in his senses could refuse. And here there is no room to presume, for the contrary appears. Thomas Dacres dissented during his whole life, and never took possession. The contrary appears, too, from the writing itself. It never was the intent that the Dacres should take possession or pay rent. It was to be a conveyance only of the ideal freehold, which might non-suit the remainder-man in case he brought an ejectment against third persons; or prevent his suffering a recovery; but never could be any security to him for his rent.

It is immaterial whether an owner of the inheritance could convey an ideal freehold, to delay the tenant in tail, claiming under his grant, from suffering a recovery.

The question here is, whether it be that usual husbandry lease, reserving a rack rent, which is intended by every power of leasing.

It is very clear that none of the lessees were bound by this writing; more especially, that Thomas Dacres was not. But I go further: Sir Robert Atkyns, the nominal lessor, was not bound by it. The deed never was out of his own possession. The declared intent proves it a trust for Sir

Robert himself. His will, under which the lessor of the plaintiff claims, avers it to be a trust, and devises it as such.

It is no objection to a lease under a power, "that it is in trust for him who executes the power:" provided the legal tenant be bound during the term in all requisite covenants and conditions. But here, at the death of Sir Robert the father, those in remainder had no tenant to resort to; and the nominal tenant never did in fact enter, nor could either in law or equity ever have been compelled to enter, or pay one farthing rent. So that this writing, calling itself an indenture, and purporting to be a contract, is waste paper only, by which nobody ever was bound.

But suppose it had been executed by the three Dacres, it could not be supported as a lease within the meaning of the power; upon a variety of plain objections, in respect of the premises, the rent, and the remedy.

1st. As to the premises demised:—It comprises too much and lays the remainder-man under difficulties to know whether the best rent is reserved. It extends to things out of which no rent can be reserved—as tithes, rents of assize, rents of customary tenants, commons, feedings, and lands in the several tenures of particular persons.

The condition of the power is, that there should be no term exceeding three lives in being at the same time: yet the demise extends to all and every the rents reserved upon any leases or grants.

2dly. As to the rent reserved:—The power requires "the best rent that can be reasonably got, to be reserved payable during the term."

There is no covenant for payment. Under a mere reservation it could not be payable till entry; and therefore, in fact, might never be payable during the term. It is not found "to be the best rent."

3dly. As to the remedy:—There being no covenant to pay the rent, the lease might be assigned to a succession of beggars. There being no clause of re-entry, the ground might lie unoccupied without any or not sufficient distress upon it: so that the remainder-man could neither have his rent nor his land. There is no counterpart; an unusual omission, and very prejudicial.

Therefore the lease could not have been supported, if it had been executed by the three Dacres, which is not the case.

Every fraudulent, unfair, prejudicial execution of such a power, in respect of those in remainder, is void at law.

If the lease be a void execution of the power against all claiming under the settlement, it cannot be made good against the reversion in fee, whereof Sir Robert Atkyns the father was seised, either by virtue of the livery, or by way of estoppel, supposing the three Dacres to have executed; because an interest would have passed during the life of Sir Robert Atkyns the father; and there is no estoppel where any interest passes; and to make it operate by virtue of the livery, out of the reversion in fee, would be contrary to the whole intent of the deed plainly expressed. Which brings me to a second answer given.

2d answer to the excuse for not entering.

2d answer. Suppose this pocket undelivered grant of the ideal incorporeal freehold a good execution of the power; they have argued that it determined with the estate tail: that the only cause of the grant being to preserve the reversion during the estate tail, must qualify the grant, and amount to a limitation; that there is no technical form of words necessary to express a contingency, upon which an estate for lives may sooner determine.

The deed might have said expressly, "if the heirs male of Sir Robert Atkyns the son continue so long;" or, "that the lease should determine, if, during the lives, the estate tail should be spent." That the intent of the deed, plainly expressed, is tantamount.

3d answer to the excuse for not entering.

3d answer. Suppose it to subsist;—it is as a trust, and devised as such, to attend the inheritance of the lessor of the plaintiff, which came into possession the 9th of October 1712: his title and right of entry then accrued.

This lease was one of his muniments; a mere weapon in his hands; and it would be going a great way to say "Such a form should take from an adverse possession the benefit of the statute."

But as we are all clear, "that at the trial a surrender of such a lease might, and ought to be presumed, to let in the Statute of Limitations," the special verdict here not having found such surrender, we cannot come at the justice of the case in that shape.

It is unnecessary to go into this point, or the former; and it would be very improper unnecessarily to do it.

If the Dacres had no estate by virtue of this demise upon

the 9th of October 1712, then this ejectment was not brought within twenty years after the lessor's title accrued; and no facts are found to excuse him within any of the exceptions.

Therefore we are all of opinion that there should be *judgment for the defendants.*

A writ of error was brought in the House of Lords, and came on upon Thursday 26th January 1758. The counsel agreed, and were allowed, to argue the last point for the judgment of the house; first, because if their lordships should be of the same opinion with the Court of King's Bench, "that this ejectment was barred by the Statute of Limitations," it would be quite unnecessary to go into the first question.

All the judges were ordered to attend; to whom, after the argument at the bar was over, the house proposed the following question; *viz.:*—

"Whether sufficient appears by the special verdict in this cause to prevent the lessor of the plaintiff, by force of the Statute of Limitations, of the 21st of King James the First, from recovering in this ejectment?"

Whereupon, the Lord Chief Justice *Willes*, having conferred with the rest of the judges, delivered their unanimous answer: "That sufficient does appear by the special verdict in this cause to prevent the lessor of the plaintiff, by force of the Statute of Limitations of the 21st of King James the First, from recovery in this ejectment."

Then the judgment of the Court of King's Bench was *affirmed*, with £5 costs.

THE doctrine of *adverse possession*, until very lately, constituted, and perhaps still constitutes, one of the least settled although most important heads of English law. The difficulties which surrounded it seem to have had an origin subsequent to the abolition of a great proportion of the ancient tenures by St. 12, Car. 2, cap. 24. Before that event, the difference seems to have been well understood between the sort of wrongful holding which would reduce the interest of the lawful owner to a right capable of being barred by the statute of limitations, and substitute the wrong-doer for him meanwhile, as the representative of the freehold and the person responsible to the lord for feudal dues and services, and that species of unwarrantable possession which was accompanied by no such consequences. At all events, it is not till a comparatively modern period that we find any complaints

about the difficulty of ascertaining what did or what did not constitute *adverse possession*. At last, however, this difficulty not only arose, but became so considerable, that in *Taylor* dem. *Atkins* v. *Horde*, so long the leading case upon this subject, we find Lord *Mansfield* saying, that "the precise definition of what constituted a *disseisin*, which made the disseisor the tenant to the demandant's præcipe, though the right owner's entry was not taken away, was once well known, but is not now to be found. The more we read, the more we shall be confounded." The view taken by his lordship in that case is, that *disseisin* at the common law "signified some mode or other of turning the tenant out of his tenure, and *usurping* his place and feudal relation:" an act which was also accompanied by this consequence: namely, that, if the disseisor died seised, the descent to his heir gave *him* the right of possession, and tolled or took away the true owner's entry. Co. Litt. 238 a, Litt. 426. This being the state of things at common law, the *assize of novel disseisin* was invented; which being found a beneficial remedy, but being applicable only to the case of a person *disseised*, a fiction grew up and was encouraged by the Courts according to which a party wrongfully out of possession, although not *disseised*, properly speaking, of the freehold, was permitted to treat the wrong done him as a disseisin for the sake of entitling himself to an assize. "In a word," says Lord *Mansfield*, "*for the sake of the remedy, as between the true owner and the wrong-doer to punish the wrong, and as between the true owner and naked possessor to try the title*, the assize was extended to almost every case of obstruction to an owner's full enjoyment of lands, tenements, and hereditaments." This sort of supposed disseisin obtained the name of *disseisin at election*, for the purpose of distinguishing it from the other, or *actual disseisin*, the consequences of which were widely different.

For, after an *actual disseisin*, the disseisee could not devise or dispose of the lands, inasmuch as his interest was, by the disseisin, cut down to a right of entry which the policy of the old law against maintenance would not allow him to depart with; and further, if a descent was cast after a year, he lost his right of entry, and was put to his real action in order to reinstate himself.

When St. 21 Jac. 1, cap. 16, had passed, his condition became still worse; for, by that act, it was ordered "that no person should make any entry into any lands, tenements, or hereditaments, but within twenty years next after his or their right or title shall *first* descend or accrue to the same, except infants, *femes coverts*, persons *non compotes mentis*, imprisoned or beyond the seas, who shall have ten years next after his and their full age, discoverture, comeing of sound mind, enlargement out of prison, or comeing into this realm to make their entry or claim in." Previous to this, the claimant might have entered at any time, provided that his entry was not *tolled*. *Bevill's* case, 4 Co. 11 b. But this statute, in twenty years, barred the disseisee's entry in the same way that a descent cast barred it at the common law; and the right owner was, after that time, put to his real action, the period for commencing which had been before limited by st. 32, H. 8, c. 1. and was, in the extreme case—that, namely, of a writ of right on the demandant's ancestor's own seisin—terminated at the expiration of sixty years from the time when the right first accrued which the writ was sued forth to recover.

This statute, however, it is apprehended, only ran against the true owner in those cases in which he would, at common law, have been put out of his tenancy and reduced to his right of entry; but not to cases in which he might have *elected* to consider himself disseised, although not really so, for the purpose of entitling himself to maintain an assize; and, consequently, whenever the question arose whether a particular claimant was barred by having been twenty years out of possession, the mode of solving this question was by considering whether he had been out of possession under such circumstances as had reduced his interest to a *right of entry*; for, if he had, then, as that right of entry would be barred by St. 21 Jac. 1, at the end of twenty years, the possession during the intermediate time was *adverse* to him. Now, in order to deter-

mine whether the claimant had been out of possession under circumstances which would turn his estate to a right of entry, it was necessary to inquire in what manner the person who had been in the possession during that time held. See *Reading* v. *Royston*, Sal. 423. If he held in a character incompatible with the idea that the freehold remained vested in the claimant, then, as the case would arrange itself under some one of the heads *disseisin*, *abatement*, *discontinuance*, *deforcement*, or *intrusion*—all of which expressed at common law different modes of substituting a freeholder by wrong for one by right, so as to make the new comer tenant to the lord and to a stranger's *præcipe*, see 1 Roll. 659, &c.; Co. Litt. 277, it followed that the possession in such character was *adverse*. But it was otherwise if he held in a character compatible with the claimant's title. And, in order to ascertain in what character the person in possession held, the court would look at his conduct while in possession. See *Doe* d. *Grubb* v. *Grubb*, 10 B. & C. 816; *Smartle* v. *Williams*, 1 Salk. 246; *Williams* v. *Thomas*, 12 East 141; *Doe* v. *Perkins*, 3 M. & S. 271; *Hall* v. *Doe* d. *Surtees*, 5 B. & A. 687; *Doe* d. *Foster* v. *Scott*, 4 B. & C. 706; *Doe* d. *Humann* v. *Pettet*, 5 B. & A. 223; and *R.* v. *Axbridge*, 2 Ad. & Ell. 520.

It is therefore apprehended that at the time of the enactment of 3 & 4 W. 4, c. 27, the question whether possession was or was not *adverse* was to be decided by inquiry whether the circumstances of that possession were sufficient to evince its incompatibility with a freehold in the claimant. It is not intended to carry the discussion of this part of the subject much further, since the above statute has, as will be shown, rendered the doctrine of *adverse possession* of less importance, so far as claims of title founded upon twenty years' enjoyment are concerned.

A title may, however, even now, depend upon a fine, and five years' non-claim prior to that act and to Stat. 3 & 4 W. 4, c. 74, which abolished fines and recoveries. For instance, supposing an ejectment to be brought against A for lands of which he had been in possession 19 years, and of which he had levied a fine before 3 & 4 W. 4, c. 74. In such a case, not having been in possession 20 years, he could, of course, have no defence under St. 3 & 4 W. 4, cap. 27. His defence, if any, would rest upon the operation of the fine. But, in order that the fine might operate for his advantage, it would be essential that there should have been an adverse possession at, and for five years after, the time of levying it. *Doe* v. *Perkins*, 3 M. & S. 271; *Hall* v. *Doe*, 5 B. & A. 687, *et* v. 1 Prest. Conv. 224, 310. So that the question of adverse possession or not may still become material, with a view to determining the operation of a fine. Now, *primâ facie*, there certainly does not seem to be any reason why the adverse possession necessary to make a fine with proclamations operate by way of bar should be in any respect different from the adverse possession necessary (before the late act) for the purpose of barring a right of entry. It is true that the *effect* of the fine was more extensive than that of the statute of Jac. 1; since the one barred the true owner's *right*, the other only his remedy by way of entry. But, though their operations (where they did operate) were different, I cannot help thinking that the adverse possession necessary to enable either to operate at all must have been the same; for in both cases it seems to have been necessary that the claimant's estate should have been devested, before either the twenty years or the five years would begin to run. It would, therefore, have been submitted pretty confidently, that the same species of adverse possession would have sufficed for both purposes, were it not for *Doe* d. *Parker* v. *Gregory*, 2 Ad. & Ell. 14, where the contrary seems to have been the opinion of the Court of Queen's Bench. In that case, Thomas Rogers, being seised in fee, devised to his son Thomas for life, remainder to William in tail male, remainder to his own right heirs. After his death, Thomas, the first tenant for life, (having a power to jointure in that manner,) settled the lands upon his wife for life and died. His wife survived him, and married a person of the name of Vale, who, along with her, levied a fine of them. She died, and 20 years elapsed; after which (Vale having died in 1832, and

William's issue having failed) the heir of Thomas Rogers, the devisor, brought an ejectment. The Court held that he was barred, saying, that "in *Doe* d. *Burrell* v. *Perkins*, 3 M. & S. 271, (which, by the bye, has been much questioned ; see *note*, 1 Wms. Saund. 319 d ; also Watk. Conv. by Morley & Coote, p. 26,) the Court was of opinion, that a fine levied by a person who was in possession under the same circumstances as the defendant* here operated nothing, because he came in by title, and had no freehold by disseisin ; and it was argued that the defendant here was also to be considered as having entered rightfully, and committed no disseisin. *We are, however, of opinion, that, though this may be so for the purpose of avoiding a fine, it cannot prevent the defendant's possession from being wrongful from the very hour when his interest expired by his wife's death.* It is clear that he might have been turned out by an ejectment. *We think, therefore, that his continuing the same possession for twenty years entitles him to the protection of the statute of limitations, and that this action has been brought too late.*"

It would perhaps be difficult to support the above distinction upon principle, since, on the one hand, it was well settled that a fine with proclamations would operate as a bar if levied by a person having acquired a tortious freehold ; and, on the other hand, it is impossible to conceive how the statute of limitations could have begun to run until such a freehold had been acquired by some person, since, as that statute only forbade the assertion of a right of entry after the lapse of twenty years, it never could begin to run against any person who had not previously been put to his right of entry, which could not be the case until some one had acquired an adverse freehold, inasmuch as the person in actual enjoyment must have been in of an estate either consistent or inconsistent with that of the true owner : now, if it were *consistent*, the possession of the occupier would be *his* possession, and he would not be put to his right of entry, nor could the statute begin to run against him ; if *inconsistent*, then it must have been a tortious freehold, since a wrong-doer could not possibly have acquired a less estate ; and, in that case, a fine with proclamations duly levied would have operated. It may be said, that *Doe* v. *Gregory* is itself an instance of a case in which the Statute 21 Jac. 1 ran, although St. 4 H. 7, c. 24, (of Fines,) would not have done so. But, with submission, it may be suggested, that though the fine in *Doe* v. *Gregory* was manifestly inoperative, yet it might be open to some doubt whether the St. of 21 Jac. 1 ought to have been held a bar, since Vale, having come in rightfully upon his marriage, was, on his wife's death, in the situation of a person who had come in by right and held over without right, which is the very definition of a tenant by sufferance. See Com. Di. Estate 1 Co. Litt. 57 b, *ubi* "tenant pur terme d'auter vie continueth in possession after the decease of *ce' que vie*, the lessor cannot have an action of trespass before entry." It is true that, as the Court remarked in *Doe* v. *Gregory*, Vale might have been immediately turned out by an ejectment : but that might be, not because his possession was adverse, but because a tenancy at sufferance would constitute no defence in that action. In the place above adverted to, Lord Coke proceeds—" Now that a writ of entry *ad terminum qui præteriit* lyeth against such a tenant as holdeth over, is rather by admission of the demandant, than for any estate of freehold that is in him, for in judgment of law he hath but a bare possession." And Lord Hale adds in a note—" Tenant for years surrenders and still continues possession ; he is tenant at sufferance or disseisor at election." Now it is apprehended that the possession of a tenant by sufferance never could be adverse, and that, indeed, it was for the very purpose of preventing the true owner's entry from being taken away, that the law originally raised such tenancies. See Co. Litt. 57 b, 1 Roll. 659, and the note by Messrs. Morley and Coote, Watk. on Conv., 6th ed. p. 24, where this subject is very ably handled. It is not, however, necessary to impugn the decision in *Doe* v. *Gregory*, since Lord Coke's Commentary proceeds, *ubi supra*,—" There is a diversity between particular estates created by the tenant, and particular estates created by

* *Sic ;* but should be, " Vale the husband."

act in law; as, if a guardian after the full age of heire continueth in possession, he is no tenant at sufferance, but an abator against whom an assize of mort d'ancestor doth lye, *et sic de similibus*;" and Lord Hale adds,—"If guardian in such case die seised, the entry of the heir tolls." So that, on this distinction, it may be argued, that the wife's estate, in *Doe* v. *Gregory*, having been cast upon the husband Vale by act of law, his continuance in possession was not as tenant at sufferance, but as an intruder against the remainder-man, in which case he would have acquired a tortious freehold, and the Statute 21 Jac. 1 would clearly run. But, with submission, so would the statute of non-claim have run too, had the fine been one capable of operating. It, however, was not so, but at the time when it was levied, namely, during the wife's life, was, beyond dispute, void. So that the arguments above hazarded are directed, not against the decision in *Doe* v. *Gregory*, but against the *dictum*, which was not essential to the decision of the case, that a possession might be adverse within 21 Jac. 1, and yet not adverse for the purpose of the statute of non-claim.

The above remarks are hazarded with much diffidence, as well on account of the high authority of the *dictum* in *Doe* v. *Gregory*, as also because an opinion certainly has been entertained by persons of learning that there might be a possession adverse under 21 Jac. 1, yet not amounting to the seisin of a freehold by wrong. This opinion receives countenance too from part of the elaborate judgment of Lord Mansfield in *Taylor* v. *Horde*. But I confess, it seems to me impossible to understand how the possession of land could be otherwise than either *consistent* with the rightful claimant's freehold—in which case it could not be adverse to it,—or *inconsistent* with it, in which case it must have become so by reason of the acquisition of a tortious fee, since no wrong-doer could acquire a less estate, inasmuch as, to use the expressions of Lord Hobart, Hob. 323, "Wrong is unlimited, and ravens all that can be gotten."

These observations on the old doctrine of *adverse possession* seem best concluded by the remark, that should a question be ever again raised as to the species of possession necessary for the purpose of rendering a fine with proclamations operative, such question will be more easily answered after consulting *Davies* v. *Lowndes*, 5 Bingh. N. C. 173, where the doctrine is thus stated to the grand assize by the Lord C. J. of the Common Pleas:—

"I was about to tell you," said his Lordship, "what the condition of a party who levies a fine should be, in order to give it effect or validity. Your tenant can never levy a fine so as to injure you the landlord; and, if a party receives possession of an estate from another for a term of years, a fine levied by such a person would be merely void. A fine levied by a stranger to the estate, who had nothing to do with it, would be merely void. It would be a singular thing if any body of laws would allow such a proceeding as that two persons, by collusion between themselves, might go through a process in a court of justice which would deprive the possessor of his right to the estate. It is necessary, therefore, in order that a fine may have its validity, that the person who levies the fine should have a freehold estate, either by right or by wrong. If he has turned out a lawful possessor of it, if he has committed a disseisin, he has what is called a wrongful freehold; and if the party entitled has not claimed within five years after the fine has been levied, that would be a bar to him. Or if a person has been in by right adversely to the rest of the world, and asserting the dominion to be his own, and levies a fine; after the proclamations have been made and five years have expired, any dormant or latent claim would be equally barred: and, therefore, the question for you to determine will be, *whether Mr. Selby, at the time when the fine was levied in Trinity Term* 1784, *was in possession of this estate to which the fine relates, having entered upon it, and claiming it or exercising the right to it as his own. If he was so, he had such an estate as would make the fine levied by him a fine available at law.*"

We now come to Stat. 3 & 4 W. 4, cap. 27, entitled, *An Act for the Limitation of Actions and Suits relating to real property, and for simplifying the remedies for trying the rights thereto.* "The second

and third sections of this act," to use the language of the Court in the principal case, "have done away with the doctrine of non-adverse possession, and, except in cases falling within the fifteenth section of the act, the question is, *whether twenty years have elapsed since the right accrued.*"

The sections in question are as follows: Sec. 2. "And be it further enacted, That after the 31st day of *December* 1833, no person shall make an entry or distress, or bring an action to recover any land or rent, *but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims;* or, if such right shall not have accrued to any person through whom he claims, then *within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same.*"

The time of limitation having been thus directed to run *from the time at which the right first accrued*, the mode in which that time is to be ascertained is pointed out by the third section, which enacts, — "That in the construction of this act, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned; (that is to say,) when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued *at the time of such dispossession, or discontinuance of possession, or at the last time at which any such profits or rent were or was so received;* and when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt, in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest, who shall have been in such possession or receipt, then such right shall be deemed to have first accrued *at the time of such death;* and when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being in respect of the same estate or interest, in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued *at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument;* and when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land or the receipt of such rent, in respect of such estate or interest, then such right shall be deemed to have first accrued *at the time at which such estate or interest became an estate or interest in possession;* and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued *when such forfeiture was incurred, or such condition was broken.*"

Now, with regard to this third section I will here remark, that, according to the doctrine of the Court of Common Pleas, in the late case of *James* v. *Salter*, it is not intended to comprise all cases falling within the operation of the second, but only to give examples of the *modus operandi* of the second section upon certain cases. This doctrine of the Court of Common Pleas is contrary to the impression which had been entertained upon the subject by Sir Edward Sugden. The case of *James* v. *Salter* will, however, be discussed at greater length towards the conclusion of the note. Perhaps it may turn out that, practically speaking, there is no great difference between the construction adopted by the Court and that suggested by Sir

E. S., since the opinion of the latter seems to be, that every case is included within the terms of the third section; of the former, that, though some cases are not specifically included within the terms of the third section, still, that the application of the second section to them is to be regulated by a regard and in analogy to the instances given in the third section.

The general enactment of the second section being as above, the reader will observe that, with some exceptions which shall be hereafter noticed, and except in cases provided for by the fifteenth and thirty-eighth sections, it is retrospective. The fifteenth section enacts, "That when no such acknowledgment as aforesaid (the nature of this acknowledgment will be presently stated) shall have been given before the passing of this act, and the possession or receipt of the profits of the land, or the receipt of the rent, *shall not at the time of the passing of this act have been adverse* to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years herein-before limited shall have expired, make an entry or distress or bring an action to recover such land or interest at any time *within five years* next after the passing of this act."

The thirty-eighth section enacts, "That when, on the said 1st day of June, 1835, any person whose right of entry to any land shall have been taken away by any descent cast, discontinuance, or warranty, might maintain any such writ or action as aforesaid (referring to the abolished actions) in respect of such land, such writ or action may be brought after the said 1st day of June, 1835, but only within the period during which, by virtue of the provisions of this act, an entry might have been made upon the same land by the person bringing such writ or action if his right of entry had not been so taken away."

On the construction of the fifteenth section, which has however now, in consequence of the lapse of the five years, become of comparatively slight importance, the reader may consult *Doe* d. *Jones* v. *Williams*, 5 Ad. & Ell. 291; *Doe* d. *Burgess* v. *Thompson*, 5 Ad. & Ell. 532.

Except where this section or some one of the other exceptions hereinafter mentioned applies, the second section is decided by the principal case to be, and is, indeed, clearly in its terms *retrospective:* so that, supposing A. to have gone out of possession twenty years ago, and his title not to have been since acknowledged, he would be barred though great part of that twenty years elapsed previous to the passing of the statute, and though the possession of the party in enjoyment might not have been adverse to him previous to the passing of the act. It was attempted in one case to stretch this retrospective operation further than either reason or convenience would have warranted. In *Doe* d. *Thompson* v. *Thompson*, 6 Ad. & Ell. 721, it appeared that James Thompson, in 1807, became tenant-at-will to W. T. who was seised in fee; that he remained in possession till 1831, (previous to the passing of 3 & 4 W. 4. c. 27.) when he died, and his widow had ever since continued in possession. The action was brought by the heir-at-law of James Thompson, who contended that, by the retrospective operation of the statute and the possession of James for twenty years, a title had accrued to himself. The Court, however, held otherwise. "The act," said *Littledale*, J., "in the clauses referred to must contemplate cases where the possession has continued; otherwise a party might go back to an unlimited period of time for the possession on which his claim was to be founded."—"The case," said *Patteson*, J., "would have been quite different if the tenant-at-will had continued in possession. But here, after the possession has been long determined, it is contended that a fee-simple arises by the passing of the act: that cannot be."

Having said thus much as to the general effect of the second and third sections of the act, the former of which establishes the limitation of twenty years from the accrual of the right, while the latter points out from what time the right shall be said to accrue in the several classes of cases there provided for, let us proceed to consider the effect of the statute on persons occupying certain particular characters,—those, namely, of *heir-at-law*,

devisee, *executor* or *administrator*, *reversioner* or *remainder-man*, *issue in tail*, *landlord* or *tenant*, *mortgagor* or *mortgagee*, *trustee* or *cestuy que trust*.

With regard to the *heir-at-law*, it is clear that (supposing his ancestor to have died in possession of the land or profits) he will be barred if he allow twenty years to pass without acknowledgment; the words of the third section being—"When the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate and interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, *then such right shall be deemed to have first accrued at the time of such death*."

Formerly, indeed, if a younger brother had entered generally on the death of the ancestor, his entry was in law that of his elder brother; Co. Litt. 242 a. Gilb. Ten. 28; and so, if one coparcener had entered generally, it would have preserved the right of the other. Co. Litt. 243 b. 373 b. This doctrine is, however, now abolished by sections 12 and 13, the operation of the former of which seems to be *retrospective* of the latter *prospective* only, and which enact—

(*Sec.* 12.)—"That when any one or more of several persons entitled to any land or rent as coparceners, joint tenants, or tenants in common, *shall have been* in possession or receipt of the entirety, or more than his or their undivided share or shares of such land or of the profits thereof, or of such rent, for his or their own benefit, or the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them."

(*Sec.* 13.)—"That when a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, *shall* enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir."

As to the case in which the ancestor died out of possession, and after the twenty years had begun to run against him, in that case the heir only has as long as the ancestor would have had, had he continued to live; that case being provided for by the third section as follows:—

"When the person claiming such land or rent, *or some person through whom he claims*, shall, in respect of the estate or interest claimed, have been in possession or receipt of the profits of such land or the receipt of such rent, *and shall while entitled thereto have been dispossessed or have discontinued such possession or receipt*, then such right shall be deemed to have first accrued *at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received*."

Devisee.

In the case of a *devisee in fee* (who is a *hæres factus*) the right depends on the same words as that of the heir and accrues at the same period, unless indeed in the possible case which will be hereafter adverted to. With regard to the devisee of a particular estate, his right also accrues at the period of the testator's death, since no person had any right to such estate before. See *James* v. *Salter*, 3 Bing. N. C. 545; a decision which will be found set forth and commented on at the conclusion of the note.

Executor and Administrator.

The case of an *administrator* is expressly provided for by section 6, which directs that he shall claim as if there had been no interval between the death and the grant of administration. The *executor* obviously falls within the same rule as the devisee in fee.

Remainder-man and Reversioner.

The position of a *remainder-man* or reversioner is a good deal altered by the operation of the statute. Previous to the act, it will be recollected that a person entitled to a vested remainder or a reversion had always twenty years after the arrival of the time at which his estate

would, in the regular course of things, have come into possession; and such right appears still to be allotted to him by that part of the 3rd section which enacts, "That when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have *first accrued* at the time when such estate or interest became an estate or interest in possession."

But further; before the passing of the act, a reversioner entitled to enter by reason of forfeiture had his option either to enforce the forfeiture or waive it—and, if he waived it, still retained his right of entering within twenty years after the arrival of the time at which his estate was limited to take effect in possession. Now the 3rd section of 3 & 4 W. 4, c. 27, contains the following clause:—

"And when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have *first accrued* when such forfeiture was incurred or such condition was broken."

The effect of this, it was apprehended, might possibly be to oblige the reversioner to take advantage of a forfeiture on pain of losing his right of entry; and to prevent such a construction, it was enacted by section 4—

"That when any right to make an entry or distress or to bring an action to recover any land or rent by reason of any forfeiture or breach of condition shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued in respect of such estate or interest at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened."

The object of this section is to prevent the party entitled to an estate in remainder or reversion from being barred by his own clemency in not taking advantage of a forfeiture, or by his ignorance of its occurrence, and to secure, to the person who right has, the option of considering himself put to his right of entry or not as he may think proper.

The fifth section enacts—"That a right to make an entry or distress or to bring an action to recover any land or rent shall be deemed to have first accrued, in respect of an estate or interest in reversion, at the time at which the same shall have become an estate or interest in possession by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall, at any time previously to the creation of the estate or estates which shall have determined, have been in possession or receipt of the profits of such land, or in receipt of such rent."

The object of the fifth section seems to be to prevent any doubt that might have arisen upon the question, whether a person being in possession of an estate, and then going out of possession to make room for somebody entitled to a sub-interest, could be barred of the remainder of his interest by that person's possession? For instance: suppose A. to be in possession of an estate subject to a power of leasing vested in B. B. exercises the right by making a lease for twenty years. Now in this case the fifth section declares that the possession of the lessee for twenty years shall not prevent A.'s regress at their termination, but that A.'s *right* shall be considered to have accrued anew at the end of the twenty years, and the consequent determination of the lessee's estate.

It must, however, be recollected, that the fifth section applies only to cases where the owner of the estate is dispossessed by some one *rightfully* claiming a particular interest, as, in the instance above put, by one claiming under a power; the twentieth section expressly providing, that where a person having a particular estate is dispossessed *by wrong*, the lapse

of twenty years shall bar not only that estate, but also any subsequent one existing in the same person: unless, indeed, it be revested by the entry—not of the person dispossessed or his representatives, but of some one entitled to an intermediate estate, which being previous to the estate in reversion or remainder of the person dispossessed, could not vest without causing the other to revest.

The *twentieth section* is as follows:—

"That when the right of any person to make an entry or distress or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession shall have been barred by the determination of the period herein-before limited, which shall be applicable in such case, and such person shall, at any time during the said period, have been entitled to any other estate, interest, right, or possibility, in reversion, remainder, or otherwise, in or to the same land or rent, no entry, distress, or action shall be made or brought by such person, *or any person claiming through him*, to recover such land or rent, in respect of such other estate, interest, right, or possibility, *unless*, in the mean time, such land or rent shall have been recovered by some person entitled to an estate, interest, or right which shall have been limited or taken effect after or in defeasance of such estate or interest in possession."

Some curious questions might arise upon this section. Suppose A. to be tenant for life, remainder to B. for life, remainder to A. in fee. A. is disseised, and twenty years elapse without his re-entry. A. and his heirs are now totally barred by section 20, so that no act which they can do can possibly entitle them to the remainder in fee-simple. B., however, whose right accrues upon the death of A., enters as of his life estate, and, thereupon, the remainder dependent upon it revests. Now, suppose A. to have devised this remainder—shall his devise operate on the estate revesting? or, as it could not operate at the time of his death, shall it not operate at all, and shall the remainder go to his heirs? This question, and others which might be suggested, would probably be found susceptible of argument.

Estates tail and Remainders and Reversions on Estates tail.

Sections 21 and 22 render a possession that would be destructive to the right of a tenant in tail destructive also to the rights of any person whom he could have barred; and the twenty-third section renders certain assurances, coupled with twenty years' possession, operative against the remainder or reversion on an estate tail which otherwise would not have been so.

The twenty-first, twenty-second, and twenty-third sections are as follows:—

Sect. 21 *enacts*, "That when the right of a tenant in tail of any land or rent to make an entry or distress or to bring an action to recover the same shall have been barred by reason of the same not having been made or brought within the period herein-before limited, which shall be applicable in such case, no such entry, distress, or action shall be made or brought by any person claiming any estate, interest, or right which such tenant in tail might lawfully have barred."

Sect. 22 *enacts*, "That when a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period herein-before limited, which shall be applicable in such case, for making an entry or distress or bringing an action to recover such land or rent, no person claiming any estate, interest, or right which such tenant in tail might lawfully have barred shall make an entry or distress or bring an action to recover such land or rent but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress or brought such action."

Sect. 23 *enacts*, "That when a tenant in tail of any land or rent shall have made an assurance thereof, which shall not operate to bar an estate or estates to take effect after, or in defeasance of, his estate tail, and any person shall by virtue of such assurance, at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person, or any other person whatsoever (other than some person entitled to such possession or receipt in re-

spect of an estate which shall have taken effect after or in defeasance of the estate tail), shall continue to be in such possession or receipt for the period of twenty years next after the commencement of the time at which *such assurance*, if it had then been executed by such tenant in tail or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then at the expiration of such period of twenty years such assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest, or right to take effect after or in defeasance of such estate tail."

With regard to the issue in tail—Before the statute, if tenant in tail had aliened by an innocent conveyance, *e. g.* lease and release, the issue might, upon his death, have entered; if he had aliened by a tortious one, *e. g.* as feoffment, a discontinuance took place, and they were put to their *formedon*. In both cases the right of the issue *first accrued* upon the death of the ancestor: so that, supposing the tenant in tail, *since* the statute, to alien by an innocent conveyance, there may be a question made whether the issue would be barred at the expiration of twenty years from that conveyance, or whether they would still retain their right to enter within twenty years after the death of the ancestor. In support of the former view they would urge that sections twenty-one and twenty-two could not apply, since those are only aimed at cases where the ancestor's right is affected by lapse of time, and *by reason of an entry or action not having been made or brought*, not where his right has been determined by his own conveyance, after which he could not make any entry or bring any action whatever; and that, in truth, the effect of the innocent conveyance is merely to pass to the purchaser such an interest as the tenant in tail could lawfully grant, leaving the rights of the issue untouched. On the other hand, it would perhaps be urged that the case fell within the first clause of the third section, and was a case in which a person *through whom* the issue claimed had been in possession in respect of the estate claimed, and had, *while entitled thereto*, discontinued such possession. But the words in italics form an argument against this latter construction, since, upon executing the conveyance, he would have ceased to be entitled and consequently would not have discontinued his possession *while entitled thereto*.

Suppose, next, that the tenant in tail were to convey by feoffment, this would have discontinued the estate tail before the act; but discontinuance being abolished by section 39, this case also perhaps stands on the same footing as that of an innocent conveyance.

Next, as to the remainder-man or reversioner:—It seems that wherever a voidable fee-simple is created by the tenant in tail, whether by a tortious or an innocent conveyance, the right of the remainder-man or reversioner is to a *future estate* within the meaning of the second section, and is governed thereby. In all the above cases it is obvious that, on the death of the tenant in tail who made the conveyance the statute will begin to run. [See the observations of Sir E. *Sugden* on these sections, V. & P. 10th edition.]

Landlord.

The case of a landlord is, of course, only a branch of that of the *reversioner*. There are, however, some peculiar considerations applicable to it. By the word *landlord* I understand *a reversioner in the actual receipt, or entitled to the actual receipt, of the rent of the land*. Now, previous to 3 & 4 W. 4, c. 27, the rule was that the landlord had a right to enter at the expiration of the lease, or within twenty years afterwards, even though he might, during the whole period that the lease had to run, have discontinued the receipt of the rent due from the tenant; for it was a maxim, that neither non-payment of rent nor payment of rent to the wrong person could amount to an ouster, since no person by wrong could gain another's right. B. N. P 104. *Elvis* v. *Archbishop of York*, Hob. 322. This rule, which was the same in all cases, is however considerably altered by the present act.

The general rule regarding *reversioners* is promulgated, as has been already seen,

by section 2, viz.—that "when the estate or interest claimed shall have been an estate or interest in reversion, or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land or the receipt of such rent in respect of such estate or interest, then *such right shall be deemed to have first accrued at the time when such estate or interest became an estate or interest in possession.*"

The qualifications engrafted on this rule with regard to reversions expectant on estates tail have been already shown. In the cases of landlord and tenant, the following further qualifications are to be remarked:

First, That by the provision of section 7, in the case of a *tenancy at will*, the tenancy, if not determined sooner, is to be deemed determined *at the expiration of a year*; and if the landlord neglect for twenty years after that time either to enforce payment of rent or claim possession of the land, it seems that his right to do so will be extinguished. See *Doe* d. *Thompson* v. *Thompson*, 6 A. & E. 721.

The *seventh section* is as follows:—"And be it further enacted, that when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, *as tenant at will*, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: Provided always, that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee."

Secondly, In the case of a *tenant holding under a lease not in writing*, it appears from the provisions of the eighth section, that his landlord's right is to begin to run at the end of one year (if he be a tenant from year to year), or at the end of the first period of his tenancy (if he be a tenant for any other period), unless indeed rent have been subsequently paid; for then the right will commence from the last payment, and the landlord will be barred at the expiration of twenty years from the date of such last payment.

The *eighth section* is as follows:—"And be it further enacted, That when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year or other period, *without any lease in writing*, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen)."

Thirdly, In the case of *a tenant holding under a lease in writing, the yearly rent reserved on which amounts to twenty shillings.* If the rent have been received by some person wrongfully claiming to be entitled to the reversion, and no rent been subsequently received by the rightful landlord, the landlord's right is deemed to have first accrued from the period when the wrongful receipt commenced. This is a perfectly new enactment; for under the former statutes, receipt of rent never constituted an *ouster*. Gilb. Ten. 97; *Goodright* v. *Jones*, Cruise on Fines, 3d ed. 295; *Doe* v. *Danvers*, 7 East, 299. And the policy on which it is based is thus explained by the Real Property Commissioners in their first Report, page 77: "Another rule is (speaking of the then law), that in the case of a lease, adverse possession, so as to bar the reversioner, does not commence till the expiration of the term, where rent is reserved on a lease. We consider it more reasonable that the limitation should run from the time when the rent began to be received from a person claiming adversely, so that there shall not be a new period of limitation from the expiration of the lease. The receipt of rents and profits is equivalent to the occupation of the soil. The person who is in possession of them can do nothing more to establish his rights, and the person to whom they are denied is virtually dispossessed."

The *ninth* section is as follows:—"And be it further enacted, That when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing, by which a rent amounting to the yearly sum of twenty shillings or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent subject to such lease, or of the person through whom he claims, to make an entry or distress, or to bring an action after the determination of such lease shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled."

It will be observed, that in the two first of the three cases above pointed out—that, namely, of the tenant at will, and that of the tenant holding under a lease not in writing,—the tenant may himself, in twenty years after the period fixed for the commencement of the landlord's right, acquire a right to hold out his own landlord;—while, in the third case,—that, namely, in which the tenant holds under a written lease,—*he* never can acquire a right against his landlord, for the time of limitation does not begin to run till payment of rent by him to some third person at the expiration of twenty years, from which time the right is acquired, not by the tenant, but by the third person to whom he so pays rent; for it is enacted by section 35, "that the receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee, or any person claiming under him, (but subject to the lease,) be deemed to be the receipt of the profits of the land for the purposes of this act."

With regard to the other cases between landlord and tenant, those, namely, where the lease is in writing but the rent less than twenty shillings, and where the lease is in writing and the rent has not been paid to any tortious claimant, though the rightful landlord may have discontinued the possession of it,—those cases stand upon the general rule laid down by section 3, and the reversioner's right to enter accrues on the determination of the particular estate.

The reason for this is, that where a rent of less than twenty shillings is reserved, the sum is of so small importance, that the true landlord may possibly neglect to enforce payment of it, and the tenant in possession may not think it worth his while to look strictly into the title of the person demanding it from him: indeed, the former reason is expressly given by the commissioners at the conclusion of the passage the commencement of which is above cited. And where the lease has been reduced to writing, there can at no period be any difficulty in ascertaining on what terms the tenant entered, and consequently it would be wanton to allow *him* to acquire a title to the fee, in contravention of the terms of his own written muniment.

It will be recollected, that in cases of landlord and tenant, as well as in all other cases arising on this act, an acknowledgment, such as is prescribed by sect. 14, which shall be hereafter set out, will prevent the time of limitation from barring, and cause it to begin to run *de novo* from the date of the acknowledgment.

It may be observed, upon the 7th, 8th, and 9th sections, that they do not, like the 3d section, contain merely examples of the operation of the 2d, but enactments altering the operation which the 2d section would otherwise have had. Thus, in the case of a tenancy from year to year, not created by writing, had it not been for the 8th section, the right contemplated by the 2d section would not have accrued till the determination of the tenancy by notice to quit or surrender.

Mortgagor and Mortgagee.

The case of *mortgagor* and *mortgagee* involved some difficulty. Section 28 had indeed provided that where the mortgagee had taken possession, the mortgagor should

be barred after twenty years, unless such an acknowledgment had been given as is there specified.

That section is as follows:—"And be it further enacted, That when a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent, comprised in his mortgage, the mortgagor or any person claiming through him shall not bring a suit to redeem the mortgage, but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless, in the mean time, an acknowledgment of the title of the mortgagor, or of his right of redemption, shall have been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, in writing, signed by the mortgagee, or the person claiming through him; and in such case, no such suit shall be brought but within twenty years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid and the person or persons claiming any part of the mortgage money, or land or rent, by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money, or land or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgaged money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money, which shall bear the same proportion to the whole of the mortgage money, as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage."—(See *Brown* v. *Bishop of Cork*, 1 Dru. & Walsh, 709.

But the main difficulty that arose was in the case of a *mortgagor in possession*. His situation will be found discussed, independently of this statute, in the notes to *Keech* v. *Hall*, in the first volume; but the considerations there adduced were inapplicable to cases under the 3 & 4 W. 4, c. 27; that statute having expressly declared in section 7, "that no *mortgagor* or *cestui que trust* should be *a tenant at will*, within the meaning of that clause, to his mortgagee or trustee." Hence it was contended, that, at the expiration of twenty years, the right of the mortgagee would be barred by section 2,—the words of which, it was thought, were perhaps wide enough to include his case; though certainly his case was not within the spirit of them. And in *Doe* d. *Jones* v. *Williams*, 5 Ad. & Ell. 291, the judges had expressed considerable doubt as to the true situation of the mortgagor in such a case. "How far," said *Patteson*, J., "under the third section, it is necessary for the mortgagee to bring his action within twenty years from the day of default, I cannot say. I do not see my way at all. If the third section was intended to comprehend the case of a mortgagee, it is very ill penned." However, the question is now set at rest by Stat. 7 Will. 4, and 1 Vict. cap. 28, which enacts, "that it shall and may be lawful for any person entitled to or claiming under any mortgage of land, to make an entry, or bring an action at law, or suit in equity, to recover such land, at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years

may have elapsed since the time at which the right to make such entry, or bring such action or suit in equity, shall have first accrued."

In *Murphy* v. *Sterne*, 1 Dru. & Walsh, 236, the Lord Chancellor of Ireland held that a mortgagee who had been brought before the Court *as a defendant*, was not barred by the lapse of twenty years, and the provisions of 3 & 4 W. 4, c. 27.

Trustee and Cestuy que Trust.

This head subdivides itself into four cases; for the trust may be either *express* or *implied*, and either the *trustee* or *cestuy que trust* may be in possession. *When the cestuy que trust is in possession* in a case of *express trust*, it certainly appears extremely difficult to say that his possession shall, even at law, bar the trustee, with whose right it is perfectly consistent. The trust must in such case have been created either by an instrument *inter vivos*, or a testamentary instrument. Now supposing it to be created by an instrument *inter vivos;* the trustee, if barred by the third section, would be so at least in the majority of cases by that part of it which enacts that "when the person claiming such land or rent shall claim in respect of an estate or interest *in possession*, granted, appointed, or otherwise assured by any instrument (other than a will) to him or some person through whom he claims, by a person being, in respect *of the same estate or interest*, in the possession or in receipt of the profits of the land or in the receipt of the rent, *and no person entitled under such instrument shall have been in such possession or receipt*, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, *became entitled to such possession or receipt by virtue of such instrument.*"

Now, upon this clause, there would be difficulty in saying, in the case of a bare, naked trust, that the trustee is *entitled to the possession* at all by virtue of the instrument creating the trust, which manifestly contemplates that the *cestuy que trust* shall have the possession; and there would be as great difficulty in saying "that *no person entitled under such instrument* has been in possession or receipt," when it is manifest that the *cestuy que trust*, whose only title is under the instrument, has been so. (See *Keene* v. *Dearden*, 8 East, 248; *Smith* v. *King*, 16 East, 283.) It might be, indeed, that by the words *such possession or receipt*, the legislature meant such possession as the trustee would have, that is, in respect of a legal estate; still it would be too hard to put this construction on the clause to the detriment of any other persons entitled under the trust. It may be that this case is a *casus omissus*, altogether unprovided for by the act; a construction from which no mischief could arise, since the instrument creating the express trust would always explain the nature of the possession: *or* it may be that the general provision of the second section applies, but none of the explanatory provisions of the third, and that the trustee will be barred in twenty years after the right to make his entry or bring his action has accrued; but that the time of the accrual of such right, not being pointed out by the third section, is to be ascertained by considerations independent of that section. That there may be such a *casus omissus* is clear from *James* v. *Salter*, the facts of which are hereinafter stated.

Observations very similar to the above apply where the express trust is created by a will. The third section enacts, that the right of a person who "shall claim the estate or interest of some deceased person who shall have continued in possession or receipt *in respect of the same estate* or interest until the time of his death, and shall have been the last person entitled *to such estate or interest* who shall have been in such possession or receipt, shall be deemed to have first accrued at the time of such death." Supposing that, in the case of an express trust created by writing *inter vivos*, the possession of the *cestuy que trust* cannot be held adverse to his trustee, it would be strange indeed if it were held so merely because the trust was created by will; and probably, therefore, any arguments applicable to the former case would be held to apply also with considerable force to the latter. Indeed, it may be doubted whether the devisor who created the trust, and who enjoyed the whole estate *beneficially*, can

be said ever to have been entitled to "*such*," or to have "possessed *the same* estate or interest" as the trustee takes; and, therefore, whether this case be not also a *casus omissus* unprovided for by enactment.

It may be worth while to consider the bearing of the seventh section upon these questions. The *seventh* section provides for the case of a tenant-at-will, and directs that the landlord's right shall be deemed to accrue against him either at the expiration of the tenancy, *or at* the end of one year after its commencement which shall first happen; but it also provides "that no mortgagor, or *cestuy que trust*, shall be deemed to be a tenant-at-will *within the meaning of this clause* to his mortgagee or trustee." Now it is obvious, that, for all purposes *not within the meaning of this clause*, the *cestuy que trust* continues tenant-at-will to his trustee, provided that he would have been so before the statute; and the only "*purpose* within the meaning of the clause" is that of making the time of limitation run from the end of the first year. There is, therefore, some ground for contending that the possession of a *cestuy que trust* cannot now bar his trustee where it would not have done so previous to the statute: for that, before the statute, he was in most cases tenant-at-will and his possession not adverse, and that the statute has made no difference, for that the provisions of the seventh section are inapplicable, and that, indeed, that section having defined the time at which the right of entry is to accrue in other cases of tenancy-at-will, and having left it undefined in this, the intent of the legislature must be taken to have been to leave this case as it stood before the statute.

It may indeed be said, that a landlord has always *a right* to enter on his tenant-at-will, and therefore that the general words of the second section are sufficient to comprehend this case. (See *James* v. *Salter*, 3 Bingh. N. C. 345, commented on at the end of the note.) To this, however, it may be answered, that he must, at all events, have determined the tenancy before he could bring an ejectment against him; and that though an *actual* entry, or demand, or act of ownership inconsistent with the tenancy would have determined it, still, a fictitious one was not sufficient for that purpose; for that, before the passing of the act, if a landlord had brought an ejectment against his tenant-at-will, he would have been defeated, unless he had shown that, before the day of the demise, the will had been in some manner determined, and the tenancy put an end to. *Right* v. *Beard*, 13 East, 210; *Doe* v. *Jackson*, 1 B. & C. 448.

This mode of reasoning is somewhat countenanced by the expressions of the Judges in *Doe* v. *Williams*, 5 A. & E. 291. In that case the ejectment was by a mortgagee against a *mortgagor* in possession, and the Judges seem to have doubted whether it could be held to fall within the act at all. Now the case of mortgagor in possession was not so strong as that of *cestuy que trust* in possession; since the former may be fairly contended to be, after default, a tenant at sufferance, whereas a *cestuy que trust* is almost always tenant-at-will. The former case, indeed, is now provided for by 7 W. 4, & 1 Vic. c. 28; but the latter remains untouched by that statute.

If it should in consequence of the above considerations become necessary to inquire on what principles, previous to the 3 & 4 W. c. 27, *cestuy que trust* filled the character of tenant-at-will to his trustee, that question will be found ably treated by Messrs. Morley and Coote in their note to *Watkins on Conveyancing*, 6th ed. p. 16; and see Littleton, secs. 462, 463, 464.

The above observations apply of course only to cases where the *cestuy que trust's* possession is consistent with the trust. Where it is inconsistent, no question, I apprehend, can arise, since no tenancy at will could have been implied even before the statute, and the trustee would be barred either under section 2 of the recent act or under the statute of James 1, independently of the recent act.

To cases in which the *cestuy que trust* is in possession under *an implied trust*, the observations on the wording of the third section will for the most part prove inapplicable. But those upon the provisions of the second and seventh sections

will apply. To put an instance or two of *implied trust:*—A. purchases land with his own money, and takes the conveyance in the name of B. a stranger, who, thereupon, becomes, by implication, a trustee for A. (*Anon*, 2 Vent. 361; 1 Vern, 109. *Lamplugh* v. *Lamplugh*, 1 P. Wms. 111.) A. enters into possession; he was certainly before the act tenant-at-will to B., and the proviso at the end of the seventh section (save *quatenus* the purpose of that section) leaves him so.

Again; A. enters into a contract to purchase land from B., who, thereupon, becomes, by implication, a trustee for A.'s benefit. (*Ripley* v. *Waterworth*, 7 Ves. 425.) A. enters, and, before the statute, was tenant-at-will to B.; and the proviso at the end of the seventh section (except so far as the purpose of that section extends) seems to leave him so.

Now, in these cases of implied trust, also, if the *cestuy que trust* be indeed a tenant-at-will (the case being omitted from the third and seventh sections), the question is, whether some determination of the will must not take place before the trustee's *right* accrues within the meaning of the second section. *The right to enter*, mentioned in that section, is nowhere defined, save in those subsequent sections within which the present case does not fall. Must it not, then, in other cases, mean what it meant before the 2 & 3 W. 4, c. 27, namely, *a right to bring ejectment?* and if so, are not *Right* v. *Beard* and *Doe* v. *Jackson* applicable?

Next, *when the trustee is in possession*, no question, it is manifest, can arise *at law*, the legal estate being vested in him. Readers desirous of considering how the matter stands *in equity*, may consult the 24th, 25th, 26th, and 27th sections, and the case of *Salter* v. *Cavanagh*, 1 Drury & Walsh, 668.

Having thus made a few observations on the applicability of the general enactments at the commencement of the statute to the cases of persons occupying particular characters, it seems right to say a few words upon those cases in which its operation is excluded by some provision contained in the statute itself.

The first of these is *where an acknowledgment in writing has been given* under the *fourteenth section*; which enacts, "That when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in writing signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given shall be deemed, according to the meaning of this act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress or bring an action to recover such land or rent shall be deemed to *have first accrued* at and not before the time at which such acknowledgment, or the last of such acknowledgments if more than one, was given."—The *fifteenth section* enacts, "That when no such acknowledgment as aforesaid shall have been given before the passing of this act, and the possession or receipt of the profits of the land, or the receipt of the rent, *shall not at the time of the passing of this act have been adverse* to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years herein-before limited shall have expired, make an entry or distress or bring an action to recover such land or interest at any time *within five years* next after the passing of this act."

It has been laid down in an action of replevin, that to bring a case within the fifteenth section, the absence of an *acknowledgment* ought to be pleaded; *James* v. *Salter*, 2 Bingh. N. C. 513.

Other exceptions are contained in *section* 16, which enacts:—"That if at the time at which the right of any person to make an entry or distress or bring an action to recover any land or rent shall have first accrued as aforesaid such person shall have been under any of the disabilities herein-after mentioned, (that is to say) infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas, then such person, or the person

claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress or bring an action to recover such land or rent at any time *within ten years* next after the time at which the person to whom such right shall first have accrued as aforesaid shall have ceased to be under any such disability or shall have died (which shall have first happened)."

This provision is, however, qualified in the following manner by sections 17, 18, and 19, which enact:—Sec. 17.—"That no entry, distress, or action shall be made or brought by any person who, at the time at which his right to make an entry or distress or to bring an action to recover any land or rent shall have first accrued, shall be under any of the disabilities herein-before mentioned, or by any person claiming through him, but *within forty years* next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such forty years, or although the term of ten years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired."

Sec. 18.—"That when any person shall be under any of the disabilities herein-before mentioned at the time at which his right to make an entry or distress or to bring an action to recover any land or rent shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress or to bring an action to recover such land or rent *beyond the said period of twenty years next after the right of such person to make an entry or distress or to bring an action to recover such land or rent shall have first accrued, or the said period of ten years next after the time at which such person shall have died,* shall be allowed by reason of any disability of any other person."

Sec. 19.—"That no part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, or Sark, nor any island adjacent to any of them (being part of the dominions of his Majesty), shall be deemed to be *beyond seas* within the meaning of this act."

In *Doe* d. *Corbyn* v. *Bramston*, 3 Ad. & Ell. 63, there is a decision upon these sections. A female devisee in fee married one Corbyn, and after her marriage removed from the premises, and no act of ownership had since been exercised by her, or any person claiming under her. The ejectment was brought more than forty years after the removal, but less than five years after the 3 & 4 W. 4, c. 27. The lessor of the plaintiff was the devisee's heir-at-law. The Court held that he was barred by section 17. There is, however, a consideration which does not seem to have been pressed in *Doe* v. *Bramston*, and which is not adverted to in the judgment in that case; namely, that *the words of the fortieth section are prospective.* They are: "That no entry, distress, or action shall be made or brought by any person who at the time at which his right to make an entry or distress or to bring an action to recover any land or rent shall have first accrued *shall be* under any of the disabilities herein-before mentioned, or by any person claiming through him, but within forty years," &c. Now, it will be observed, that in the sixteenth section the words are *retrospective;* namely, "that if at the time at which the right first accrued as aforesaid, such person *shall have been* under any of the disabilities," &c. So are the words of the *second*—so are the words of the *third*—so are the words of the *fifteenth* section.—So that the legislature seems to have been alive to the distinction between words *prospective* and *retrospective;* and as that point was not under the consideration of the Court in *Doe* v. *Bramston*, it will, perhaps, notwithstanding that decision, be still permitted to a party to contend that the seventeenth section only applies to disabilities subsequent to the 3 & 4 W. 4, c. 27.

It may be further observed, that there are other sections in this statute, in which *prospective* words have been inserted. Thus, in the twenty-third section there are prospective words, viz.—that where a tenant in tail shall have made an assurance "*which shall not operate to bar an estate* or estates, to take effect after or in de-

feasance of his estate tail, and any person *shall*, by virtue of such assurance at the time of the execution thereof, or at any time afterwards, be in possession," &c. "such assurance *shall be and be deemed to have been* effectual," &c.

The author of this note has been informed that several gentlemen of high professional eminence have expressed their opinion that the above section (notwithstanding that it contains some retrospective words) is *prospective*, (see Sugd. V. and P. vol. ii. 357), and that it is or was in contemplation to introduce a bill for the purpose of giving it a retrospective effect. Now, if the twenty-third section be prospective, it will be difficult to contend that the seventeenth is retrospective.

The consequence of holding the seventeenth section prospective would be, that a discontinuance of possession for any length of time previous to the 3 & 4 W. 4, c. 27, would not operate or assist in operating as a bar, provided that the person or persons entitled had been during such time under disability. Such a case, it will be perceived, might easily arise even now, and therefore it is that so much space has been attributed to the discussion of the precise effect of *Doe* v. *Bramston* on the construction of the seventeenth section. Some other consequences, flowing from that decision, are commented upon by Sir E. Sugden in the late edition of his treatise on Vendors and Purchasers.

There is another exception contained in *section thirty-eight*, which preserves the right to bring a real action to certain persons whose right of entry had, on the 1st June, 1835, been taken away; but only preserves it during that period for which their right of entry, had it not been so taken away, would have continued. Under this provision, a writ of right may possibly be even now sued forth.

The reader will remember, that, before 2 & 3 W. 4, c. 27, a right of entry might have been taken away, not only by the lapse of twenty years, bringing the case within the provisions of St. Jac. I, but also by a descent, cast, by a lineal warranty with or a collateral warranty without assets, or by a discontinuance. Now, it was possible, that, in some one of these modes, the right of entry might have been gone before the enactment of St. 3 & 4 W. 4, c. 27, though less than twenty years might have elapsed since the accrual of the title; and then, that statute having abolished the real actions applicable to such a case, the estate would have been lost by an adverse possession of less than twenty years, had it not been for the last-mentioned section, which enacts —"That when, on the said 1st day of *June* 1835, any person whose right of entry to any land shall have been taken away by any descent, cast, discontinuance, or warranty, might maintain any such writ or action as aforesaid, (*i. e.* real action,) in respect of such land, such writ or action may be brought after the said 1st day of *June*, 1835, but only within the period during which, by virtue of the provisions of this act, an entry might have been made upon the same land by the person bringing such writ or action, if his right of entry had not been so taken away."

In order to prevent the necessity of extending this enactment to future cases, section *thirty-nine* enacts — "That no descent, cast, discontinuance, or warranty which may happen or be made after the said 31st day of *December*, 1833, shall toll or defeat any right of entry or action for the recovery of land."

The reader will have observed that the remarks made in this note are confined altogether to the case of *land*, although the act contains provisions applicable to other descriptions of property. It was conceived that it would have embarrassed the consideration of the principal subject, and rendered the note (already an overgrown one) much too long, had the application of the statute to those other subject-matters been discussed. There is however, one decision upon the application of the act to *rents* which it is right to notice, because of its effect on the construction of the second and third sections as regarding lands. The case intended is *James* v. *Salter*, 2 Bingh. N. C. 505, and 3 Bingh. N. C. 545. It was an action of *replevin*. *Avowry*—in respect of a rent-charge devised by J. S. to the defendant, and issuing out of the *locus in quo*. *Second plea in bar*—that the distress was not made within twenty

years next after the time at which the right to make a distress first accrued to the defendant,—*traverse and issue joined.* —(The record was in reality more complex ; but so far as relates to the present subject, the above was the effect of it.)

At the trial, it appeared that the testator died on the 1st of May, 1805. It was contended that the avowant was barred by the second section of 3 & 4 W. 4, cap. 27. And the Court of C. P., upon a motion for a new trial, held that he was not so barred.

The L. C. J. stated the question to be, " whether, within the meaning of this act of parliament, a party who has never been in the receipt of an annuity granted more than twenty years before he lays claim to it, may still distrain for the arrears of the last twenty years, or whether the statute operates under such circumstances as an absolute bar to any claim at all."

His Lordship said, that "*if we examine the three different conditions expressed in the third section*, this case cannot fall within either, unless it be the last—' claims in respect of an interest assured by any instrument, *other than a will*, by a person being, in respect of the same interest, in receipt of the profits of the land, where no person entitled under the instrument has been in such receipt ; ' and from this bequests by will are expressly exempted."

Mr. J. Bosanquet said, that " there might have been a question under the second section, whether the right of action was not barred by the lapse of twenty years, *but the act does not stop at the second section—it goes on in the third to specify the occasions when a right shall be deemed to have first accrued within twenty years ; and as the case does not fall within the three instances specified in that section, we think the annuitant was not barred.*"

The effect of this decision would have been to limit the operation of the second section by the third ; so that every case not provided for by the third section would have been taken out of the operation of the second section—that is, out of the operation of the statute altogether.

But this decision was overruled by the same Court in *James* v. *Salter*, 3 Bingh. N. C. 545, which arose on the same state of facts set out, upon a second trial of the same cause, in a special verdict ; the Court holding on argument, that " the case was governed by the second section of the statute, which, under the facts found in the special verdict, affords a bar to all claim and title to the annuity."

" That the case," said the Lord C. Justice, delivering the judgment of the Court, " must have been governed by the second section, if that section had stood alone, cannot be doubted ; and, upon a more close examination of the third section, the object and intent of it seem to us to be no more than this—to explain and give a construction to the enactment contained in the second clause as to the time at which the right to make a distress for any rent shall be deemed to have first accrued, in those cases only in which doubt or difficulty might occur, leaving every case which plainly falls within the general words of the second section, but is not included among the instances given by the third, to be governed by the operation of the second. . . . . Indeed, unless this is held to be the true construction, the case which is likely to occur, perhaps with the most frequency, viz.—the *devise of an estate in possession in land*, (the word *particular* has probably been omitted here by the reporter,) or of an estate in possession in a rent-charge first created by the will—would be altogether unprovided for by the statute ; for the third class of instances enumerated in section third, describes the grant to be 'by a person being *in respect of the same estate or interest in the possession* or receipt of the profits of the land, or in the receipt of the rent;' a description which can neither apply to the case of a devise of a particular estate in land, or of a newly-created rent ; for the devisor, who has by his will carved an estate in land out of the estate whereof he was seised, can never be said to have been possessed in respect of *the same estate or interest* as that claimed by the devisee ; still less can the devisor, who creates a new rent-charge by his will, be said to have been in the receipt of the rent. The case, therefore, under discussion *not falling within the third section, but falling within the clear and unambiguous terms of the second, we hold to be governed thereby ;* that the claim and title of

the defendant Salter to the annuity is barred by the lapse of twenty years since his right to distrain first accrued; and that the verdict upon the second issue must be entered for the plaintiff."

Some observations on the effect of this decision will be found in 2 Sugd. V. & P. 337, where it is remarked, that "if the criticism of the Common Pleas be correct in regard to the language of the third section, which speaks of *the same estate or interest*, no case, although a grant within that section, and not a will, would fall within it, where a particular estate or a rent was created by it." Sir Edward Sugden's own construction of the third section was, that such particular estates and rents would have been included in the third section; and that being derived out of the estate of the devisor or grantor, he might well enough be said to have been in possession, in respect of *the same estate or interest*. And certainly it is held that the assignee of *part* of a reversion is an assignee of *the reversion* within the meaning of St. 34 H. 8, cap. 34, (see the cases collected in the notes to Spencer's case, vol. i. p.28.) But that statute, it must be remembered, uses the word *grantees* as well as *assignees*, and the words "*any reversion of or in the same*" (lands). Now, to make it completely analogous to 2 & 3 W. 4, c. 27, the words should be "of the *same* reversion," not "of *any* reversion;" so that perhaps even an argument against Sir Edward's construction, and in favour of that of the C. P., is to be found in the presence of words in the St. of H. 8, which are omitted in that of 2 & 3 W. 4, c. 27. Practically, as has been already suggested, Sir Edward's construction and that of the Court may possibly be found to produce pretty much the same effect upon the rights of parties.

It has, however, already been hinted, that cases may by possibility occur not falling within the third section, and in which also the time at which the right shall be deemed *to have first accrued* within the meaning of the second section cannot be ascertained without having recourse to the old state of the law: for instance, the case of *cestuy que trust* in possession above discussed, which there appears to be difficulty in ranging within the third or any subsequent section, and also difficulty in bringing within any analogy furnished by those sections and indicative of the time at which the second section is to begin to operate upon it; inasmuch as, by that section, the time of limitation begins to run *when the right first accrues*, and there may be a difficulty in holding the right of a landlord against his tenant-at-will to have accrued till the determination of the will, except, indeed, in cases falling within section 7, from which this case of *cestui que trust* is excluded.

It is proper, before concluding the note, to point out a singular alteration in the former law, produced by section *thirty-four*, which enacts, that at the determination of the period limited by this act, the right and title of the party to the land shall be *extinguished*. The act differs in this respect from every previous statute of limitations, excepting that regarding non-claim on a fine; their effect both upon debts, rights of action, and rights of entry, having been to bar the remedy, but leave the right *in esse*. And this section has the collateral effect of giving the tortious possessor a title against all the world after the lapse of the prescribed period; since the title of the true owner is extinguished, and there is no other person who can possibly set up a claim to the fee-simple. It will, however, perhaps be found that the security of a purchaser is not ascertained by this provision, in many cases where it would not have been so under the old system.

DOE *d.* CHRISTMAS *v.* OLIVER AND ANOTHER.

SAME *v.* OLIVER AND OTHERS.

MICH. 10 *G.* 4.—*Q B.*

[REPORTED 5 M. & R. 202.]

The interest, when it accrues, feeds the estoppel.

EJECTMENT for certain messuages and lands, situate in the parish of St. Margaret, in the town and borough of Leicester. Plea, not guilty. At the trial before *D'Oyley*, Serjt., at the Leicester Summer Assizes 1828, a verdict was found for the plaintiff by consent, subject to the opinion of this court upon the following case:—

Theophilus Holmes, being seised in fee of certain tenements, by his last will and testament in writing, bearing date 29th September 1784, duly executed and attested for the purpose of passing real estates, gave and devised as follows:—"I give and devise the messuage or tenement wherein I now dwell, with the appurtenances thereto belonging, and the use of all my household goods, plate, linen, and other household furniture of every sort and kind which shall be about my said messuage or tenement at the time of my decease, and also my messuage or tenement in Belgrave Gate, Leicester, unto my wife Christian Holmes for and during her natural life; and from and after her decease, I give and devise the said messuage or tenement wherein I now dwell, with the appurtenances, and also my said messuages or tenements" (in the said will described, being those for the recovery of which these actions are brought,) "with warehouses, stables and other buildings, yards, gardens, and backsides thereto belonging, in case I shall die without issue (but not otherwise), unto, between and among

all the children of my brother, the Rev. Mr. William Holmes, that shall be living at the time of my said wife's decease, and to their heirs and assigns for ever."

The testator died, seised of the premises in question, in September 1785, without issue, and without altering or revoking his said will. On his death, his widow, who afterwards married Joseph Chamberlain, entered into possession of the tenements in question, and so continued until the time of her death, which happened in or about September 1826. The William Holmes mentioned in the will of the testator had issue three children only; viz., James Harriman, Ann Mary, and Thomas Bradgate. James Harriman Holmes and Thomas Bradgate Holmes died without issue in the lifetime of the testator's widow. Ann Mary Holmes married Joseph Brooks Stephenson, and was the only child of William Holmes living in March 1814, and at the time of the death of the testator's widow.

On the 4th March, 1814, and during the lifetime of the testator's widow, by indenture duly made between the said J. B. Stephenson and Ann Mary his wife, (therein described as devisee named in the last will of the said Theophilus Holmes then deceased,) of the first part, J. Connor, Gent. of the second part, Charles Waldron of the third part, and Thomas Chandless, Gent. a trustee on behalf of the said Charles Waldron, and also of the said J. B. Stephenson and Ann Mary his wife, of the fourth part; the latter, in consideration of 600*l.* granted to Charles Waldron, his executors, administrators, and assigns, for and during their natural lives and the life of the survivor, an annuity of 100*l.* to be charged upon and issuing out of the said messuages or tenements devised by the will of Theophilus Holmes; and for better securing the payment, granted, bargained, and sold to Thomas Chandless, his executors, &c., all the said premises, to hold, from and immediately after the decease of Christian Holmes, for the term of ninety-nine years. And then, after reciting that the said J. B. Stephenson and Ann Mary his wife did, as of Hilary Term then last, levy before the Court of C. P. at Westminster unto T. Chandless and his heirs, one fine *sur conusance de droit come ceo*, &c. of the said premises, by the description of seven messuages, seven gardens, and one acre of land, with the appurtenances, in the parish of St. Margaret, in the

town and borough of Leicester, of which fine no uses had as yet then been declared, it was by the said indenture agreed and declared that the said fine should be and enure, in the first place, for confirming the said yearly rent-charge of 100*l.*, and, in the next place, to the use of T. Chandless, his executors, &c. for and during the said term of ninety-nine years. The said last-mentioned indenture was duly executed by the parties, and a receipt for the consideration money indorsed, and a memorial of the same was duly inrolled in the Court of Chancery. The fine referred to by the said indenture was duly levied, according to the same, in Hilary Term, 54 Geo. 3, with proclamations. On the 11th April, 1823, T. Chandless died, having made a will and several codicils, and appointed Sir William Long, Knt. and Henry Gore Chandless executors. On the 27th January, 1827, by indenture of that date between the said C. Waldron of the first part, the said executors of T. Chandless of the second part, Newbold Kinton, one of the lessors of the plaintiff, of the third part, and James Christmas, one other of the said lessors, of the fourth part, for the consideration therein expressed, the said annuity was assigned to the said N. Kinton; and the said term of ninety-nine years, for securing the same, was assigned to the said J. Christmas. On the 4th June, 1827, 1275*l.* became due in respect of the said annuity. The day of the demises laid in the declaration is the 1st November, 1827.

The questions for the opinion of the court are,

First, whether A. M. Stephenson, who was the only child of William Holmes living on the 4th March, 1814, and at the time of the death of Christian Holmes (afterwards Chamberlain), took a vested or contingent remainder under and by virtue of the will of Theophilus Holmes.

Secondly, whether the fine levied by Mr. and Mrs. Stephenson worked any forfeiture of the estate of the latter or transferred any interest therein.

The case was argued at the sittings in Banc after Trinity Term 1827, by *Preston* (with whom was *Denman*) for the plaintiff, and by *N. R. Clarke* for the defendant.

It was admitted, on the part of the plaintiff, that the estate given by Theophilus Holmes to the children of William Holmes was contingent during the lifetime of the testator's widow; but it was contended that the fine levied

by the daughter of W. Holmes, though operative only by way of estoppel during the lifetime of the testator's widow, operated after her death, when the contingency happened, on the estate which then became vested in the daughter of W. Holmes. And the cases of *Vick* v. *Edwards* (*a*), *Helps* v. *Hereford* (*b*), and *Davies* v. *Bush* (*c*), were cited, and relied on.

(*a*) 3 P. Wms. 372.
(*b*) 2 Barn. & Ald. 242.
(*c*) 1 M'Clel. & Y. 58.

For the defendant it was contended, that the estate given to the daughter of W. Holmes could not be conveyed by the fine levied during the lifetime of the widow of T. Holmes the testator, because a contingent remainder could not be so conveyed; and, therefore, that the estate still remained vested in Mr. and Mrs. Stephenson. That the fine levied by them operated by way of estoppel only, and that, of that, a stranger was not entitled to take advantage. And for the last position *Doe* v. *Martyn* (*d*) was cited and relied on.

(*d*) 2 M. & R. 485; 8 B. & C. 497.

The Court took time to consider of their judgment, which was now delivered by

Bayley, J.—This case depended upon the effect of a fine levied by a person who had a contingent remainder in fee. The short facts were these: Ann Mary, the wife of Joseph Brooks Stephenson, was entitled to an estate in fee upon the contingency of her surviving Christian, the widow of Theophilus Holmes: and she and her husband conveyed the premises to Thomas Chandless for a term of ninety-nine years, and levied a fine to support that conveyance. Christian, the widow, died, leaving Mrs. Stephenson living; so that the contingency, upon which the limitation of the estate to Mrs. Stephenson depended, happened, and this ejectment was brought by the assignees of the executors of Thomas Chandless, in whom the term of ninety-nine years was vested. It was admitted in argument, on the part of the defendant, that the fine was binding upon Mr. and Mrs. Stephenson, and all who claimed under them, by estoppel; but it was insisted that such fine operated by way of estoppel only; that it, therefore, bound only parties and privies, not strangers; that the defendant, not being proved to come in under Mr. and Mrs. Stephenson, was to be deemed not a privy but a stranger; and that, as to him, the estate was to be considered as still remaining in Mr. and Mrs. Stephenson. In support of this position reliance was placed upon

the latter part of the judgment delivered by me in the case of *Doe* d. *Brune* v. *Martyn* (*a*), and that part of the judgment certainly countenances the present defendant's argument. But the reasoning in that case proceeds upon the supposition that a fine by a contingent remainder-man operates by estoppel, *and by estoppel only;* its operation by estoppel, which is indisputable, was sufficient for the purpose of that decision; whether it operated by estoppel only, or whether it had a further operation, was perfectly immaterial in that case; and the point did not there require that investigation which the discussion of this case has rendered necessary. We have, therefore, given the subject that further consideration which it required, and we are satisfied, upon the authorities, that a fine by a contingent-remainder-man, though it operates by estoppel, does not operate by estoppel only, but has an ulterior operation when the contingency happens; that the estate which then becomes vested feeds the estoppel; and that the fine operates upon that estate, as though that estate had been vested in the conusors at the time the fine was levied.

(*a*) 2 M. & R. 485; 8 B. & C. 497.

The first authority which it is necessary to notice is *Rawlins's* case (*b*). There, Cartwright demised land, not his own, to Weston, for six years. Rawlins, who owned the land, demised it to Cartwright for twenty-one years; and Cartwright re-demised it to Rawlins for ten years. It was resolved that the lease by Cartwright, when he had nothing in the land, was good against him by conclusion, and that when Rawlins re-demised to him then was *his interest* bound by the conclusion; and that when Cartwright re-demised to Rawlins, then was Rawlins concluded also. Rawlins, indeed, was bound as privy, because he came in under Cartwright; but the purpose for which I cite this case is, to show that as soon as Cartwright got the land, his interest in it was bound. In *Weale* v. *Lower* (*c*), the case was thus:—Thomas, a contingent-remainder-man in fee, demised to Grylls for five hundred years, and levied a fine to Grylls for five hundred years, and died. The contingency happened, and the remainder vested in the heir of Thomas, and, whether this demise was good as against the heir of Thomas, was the question. It was argued before *Hale*, C. J., and his opinion was, that the fine did operate at first by conclusion, and passed no interest, but bound

(*b*) 4 Co. Rep. 52.

(*c*) Pollexf. 54.

the heir of Thomas; that the estate, which came to the heir when the contingency happened, fed the estoppel; and then the estate by estoppel became an estate in interest, and of the same effect as if the contingency had happened before the fine was levied: and he cited *Rawlins's* case, 4 Coke, 53, in which it was held, that if a man leased land in which he had nothing, and afterwards bought the land, such lease would be good against him by conclusion, but nothing in interest till he bought the land; but that, as soon as he bought the land, it would become a lease in interest. The case was again argued before the Lord Chancellor, Lord Chief Justice *Hale*, *Wild*, *Ellis*, and *Windham*, justices, and they all agreed that the fine at first enured by estoppel; but that, when the remainder came to the conusor's heir, he should claim in nature of a descent, and, therefore, should be bound by the estoppel; and then the estoppel was turned into an interest, and the conusee had then an estate in the land. In *Treviban* v. *Lawrence* (*a*), Lord *Holt* cites 39 Ass. 18 (*b*), and speaks of an estoppel as creating an interest in or working upon the estate of the land, and as running with the land to whoever takes it. In *Vick* v. *Edwards* (*c*), cited by Mr. *Preston*, Lord *Talbot* must have considered a fine by a contingent-remainder-man as having the double operation of estopping the conusors till the contingency happened, and then of passing the estate. There, lands were devised to A. and B. and the survivor and the heirs of such survivor, in trust to sell. Upon a reference to the master, he reported that they could not make a good title, because the fee would vest in neither till one died. On exceptions to the master's report, Lord *Talbot* held that a fine by the trustees would pass a good title to the purchaser by estoppel; for, though the fee was in abeyance, one of the two trustees must be the survivor, and entitled to the future interest; consequently, his heirs claiming under him would be estopped, by reason of the fine by the ancestor, from saying *quod partes finis nihil habuerunt*, though he that levied the fine had at the time no right or title to the contingent fee. On the following day he cited the case of *Weale* v. *Lower* (*d*), which I have before cited. Now, whether Lord *Talbot* was right in treating the fee as being in abeyance, and the limitation to the survivor and his heirs as a contingent remainder or not, it is evident he did

(*a*) 2 Ld. Raym. 1048; 6 Mod. 258.
(*b*) Fol. 237.
(*c*) 3 P. Wms. 371.
(*d*) Pollexf. 54.

so consider them; and he must have had the impression that the fine would have operated, not by estoppel only, but by way of passing the estate to the purchaser, because unless it had the latter operation as well as the former, it would not pass a good title to the purchaser.

Mr. Fearne, in his work on Remainders, c. 6, s. 5, says, "We are to remember, however, that a contingent remainder may, before it vests, be passed by fine by way of estoppel so as to bind the interest which shall afterwards accrue by the contingency;" and after stating the facts in *Weale* v. *Lower*, he says, "It was agreed that the contingent remainder descended to the conusor's heir; and though the fine operated at first by conclusion only, and passed no interest, yet the estoppel bound the heir: and that, upon the contingency, the estate by estoppel became an estate in interest, of the same effect as if the contingency had happened before the fine was levied."

Upon these authorities, we are of opinion that the fine in this case had a double operation—that it bound Mr. and Mrs. Stephenson by estoppel or conclusion so long as the contingency continued; and that when the contingency happened, the estate which devolved upon Mrs. Stephenson fed the estoppel; the estate created by the fine, by way of estoppel, ceased to be an estate by estoppel only, and became an interest, and gave Mr. Chandless, and those having a right under him, exactly what he would have had in case the contingency had happened before the fine was levied.

Judgment for the Plaintiff.

OPINION OF THE JUDGES

IN THE

DUCHESS OF KINGSTON'S CASE.

A. D. 1776.

Ordered by the Lords Spiritual and Temporal in parliament assembled, that the following questions be put to the Judges, viz.:—

1. Whether a sentence of the Spiritual Court against a marriage in a suit for jactitation of marriage is conclusive evidence so as to stop the counsel for the crown from proving the said marriage in an indictment for polygamy?

2. Whether, admitting such sentence to be conclusive upon such indictment, the counsel for the crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion?

Whereupon, the Lord Chief Justice of the Court of Common Pleas (Sir *William De Grey*, afterwards Lord Walsingham), having conferred with the rest of the Judges present, delivered their unanimous opinion upon the said questions, with his reasons, as follow, viz.:—

My lords; My lord chief baron, (Sir Sidney Stafford Smythe), and the rest of my brethren, have desired me to deliver their answer to the questions your lordships have been pleased to propound to us.

That our opinion may be the better understood, it is necessary to make some observations on what has passed in argument upon the subject.

What has been said at the bar is certainly true, as a general principle, that a transaction between two parties, in judicial proceedings, ought not to be binding upon a third; for it would be unjust to bind any person who could not be

admitted to make a defence, or to examine witnesses, or to appeal from a judgment he might think erroneous; and therefore the depositions of witnesses in another cause in proof of a fact, the verdict of a jury finding the fact, and the judgment of the Court upon facts found, although evidence against the parties, and all claiming under them, are not, in general, to be used to the prejudice of strangers. There are some exceptions to this general rule, founded upon particular reasons, but not being applicable to the present subject, it is unnecessary to state them.

From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: first, that the judgment of a Court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another Court: secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another Court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence, of any matter which came collaterally in question, though within their jurisdiction; nor of any matter incidentally cognizable; nor of any matter to be inferred by argument from the judgment.

Upon the subject of marriage, the Spiritual Court has the sole and exclusive cognizance of questioning and deciding, directly, the legality of marriage; and of enforcing, specifically, the rights and obligations respecting persons depending upon it; but the Temporal Courts have the sole cognizance of examining and deciding upon all temporal rights of property; and, so far as such rights are concerned, they have the inherent power of deciding incidentally, either upon the fact, or the legality of marriage, where they lie in the way to the decision of the proper objects of their jurisdiction: they do not want or require the aid of the Spiritual Courts; nor has the law provided any legal means of sending to them for their opinion; except where, in the case of marriage, an issue is joined upon the record in certain real writs, upon the legality of a marriage, or its immediate consequence, "general bastardy;"

or, in like manner, in some other particular instances, lying peculiarly in the knowledge of their Courts, as profession, deprivation, and some others; in these cases, upon the issue so formed, the mode of trying the question is by reference to the ordinary, and his certificate, when returned, received and entered upon the record in the Temporal Courts, is a perpetual and conclusive evidence against all the world upon that point; which exceptionable extent, on whatever reasons founded, was the occasion of the statute of the 9th of Henry 6, requiring certain public proclamations to be made for persons interested to come in, and be parties to the proceeding. But, even in these cases, if the ordinary should return no certificate, or an insufficient one; or, if the issue is accompanied with any special circumstances, as if a second issue, triable by a jury, is formed upon the same record; or, if the effect of the same issue is put into another form, a jury is to decide, and not the ordinary to certify, the truth; and to this purpose Sir William Staunford mentions a remarkable instance. Bigamy was triable by the bishop's certificate; but if the prisoner, to avoid the charge, pleads that the second espousals were null and void, because he had a former wife living, this special bigamy was not to be tried by the bishop's certificate.

So that the trial of marriage, either as to legality, or fact, was not absolutely, and from its nature, an object *alieni fori.*

There was a time, when the Spiritual Courts wished that their determinations might in all cases be received as authentic in the Temporal Courts; and in that solemn assembly of the king, the peers, the bishops, and judges, convened for the purpose of settling the demands of the church, by Edward the Second, one of the claims was expressed in these words: "Si aliqua causa, vel negotium, cujus cognitio spectat ad forum ecclesiasticum, et coram ecclesiastico judice fuerit sententialitèr terminatum, et transierit in rem judicatam, nec per appellationem fuerit suspensum; et postmodum, coram judice seculari, super eadem re inter easdem personas questio moveatur, et provetur per testes vel instrumenta, talis exceptio in foro seculari non admittatur." The answer to which demand was expressed in this manner: "Quando eadem causa, diversis rationibus coram judicibus

ecclesiasticis et secularibus, ventilatur, dicunt quod (non obstante ecclesiastico judicio) curia regis ipsum tractet negotium, ut sibi expedire videtur." For which Lord *Coke* gives this reason, second Institute, c. 22. "For the Spiritual Judges' proceedings are for the correction of the spiritual inner man, and, 'pro salute animæ,' to enjoin him penance; and the Judges of the Common Law proceed to give damages and recompence for the wrong and injury done;" and then adds, "and so this article was deservedly rejected."

And the same demand was made, and received the same answer, in the third year of King James the First.

It is to be observed, that this demand related only to civil suits between the same parties; and that the sentence should be received as a plea in bar. But this attempt and miscarriage did not prevent the Temporal Courts from showing the same respect to their proceedings, as they did to those in other Courts. And therefore where, in civil causes, they found the question of marriage directly determined by the Ecclesiastical Courts, they received the sentence, though not as a plea, yet as a proof of the fact; it being an authority accredited in a judicial proceeding by a Court of competent jurisdiction; but still they received it upon the same principles, and subject to the same rules, by which they admit the acts of other Courts.

Hence a sentence of nullity, and a sentence in affirmance of a marriage, have been received as conclusive evidence on a question of legitimacy arising incidentally upon a claim to a real estate.

A sentence in a cause of jactitation has been received upon a title in ejectment, as evidence against a marriage, and, in like manner in personal actions, immediately founded on a supposed marriage.

So a direct sentence, in a suit upon a promise of marriage, against the contract, has been admitted as evidence against such contract, in an action brought upon the same promise for damages, it being a direct sentence of a competent Court, disproving the ground of the action.

So a sentence of nullity is equally evidence in a personal action against a defence founded upon a supposed coverture.

But in all these cases, the parties to the suits, or at least the parties against whom the evidence was received, were parties to the sentence, and had acquiesced under it; or claimed under those who were parties, and had acquiesced.

But although the law stands thus with regard to civil suits, proceedings in matters of crime, and especially of felony, fall under a different consideration: first, because the parties are not the same; for the King, in whom the trust of prosecuting public offences is vested, and which is executed by his immediate orders, or in his name by some prosecutor, is no party to such proceedings in the Ecclesiastical Court, and cannot be admitted to defend, examine witnesses, in any manner intervene, or appeal: secondly, such doctrines would tend to give the Spiritual Courts, which are not permitted to exercise any judicial cognisance in matters of crime, an immediate influence in trials for offences, and to draw the decision from the course of the common law, to which it solely and peculiarly belongs.

The ground of the judicial powers given to Ecclesiastical Courts is, merely, of a spiritual consideration, "pro correctione morum, et pro salute animæ." They are therefore addressed to the conscience of the party. But one great object of temporal jurisdiction is the public peace; and crimes against the public peace are wholly, and in all their parts, of temporal congnisance alone. A felony by common law was also so. A felony by statute becomes so at the moment of its institution. The Temporal Courts alone can expound the law, and judge of the crime, and its proofs; in doing so, they must see with their own eyes, and try by their own rules, that is, by the common law of the land; it is the trust and sworn duty of their office.

When the Acts of Henry the Eighth first declared what marriages should be lawful, and what incestuous, the Temporal Courts, though they had before no jurisdiction, and the Acts did not by express words give them any upon the point, decided, incidentally, upon the construction, declared what marriage came within the Levitical decree, and prohibited the Spiritual Courts from giving or proceeding upon any other construction.

Whilst an ancient statute subsisted (2 H. 4, 15), by which personal punishment was incurred on holding here-

tical doctrines, the Temporal Courts took notice, incidentally, whether the tenet was heretical or not; for "the King's Court will examine all things ordained by statute."

When the statute of W. 3 made certain blasphemous doctrines a temporal crime, the Temporal Courts alone could determine, whether the doctrine complained of was blasphemous so as to constitute the crime.

If a man should be indicted for taking a woman by force and marrying her, or for marrying a child without her father's consent; or for a rape where the defence is, that "the woman is his wife;" in all these cases, the Temporal Courts are bound to try the prisoner by the rules and course of the common law, and incidentally to determine what is heretical, and what is blasphemous: and whether it was a marriage within the statute—a marriage without consent; and whether, in the last case, the woman was his wife: but if they should happen to find, that sentences, in the respective cases, had been given in the Spiritual Court upon the heresy, the blasphemous doctrines, the marriage by force, the marriage without consent, and the marriage on the rape; and the Court must receive such sentences as conclusive evidence, in the first instance, without looking into the case; it would vest the substantial and effective decision, though not the cognisance of the crimes, in the Spiritual Court, and leave to the Jury, and the Temporal Courts, nothing but a nominal form of proceeding, upon what would amount to a predetermined conviction or acquittal; which must have the effect of a real prohibition, since it would be in vain to prefer an indictment, where an act of a foreign Court shall at once seal up the lips of the witnesses, the Jury, and the Court, and put an entire stop to the proceeding.

And yet it is true, that the Spiritual Courts have no jurisdiction, directly or indirectly, in any matter not altogether spiritual; and it is equally true, that the Temporal Courts have the sole and entire cognisance of crimes, which are wholly and altogether temporal in their nature.

And if the rule of evidence must be, as it is often declared to be, reciprocal; and that in all cases in which sentences favourable to the prisoner, are to be admitted as conclusive evidence for him; the sentences, if unfavourable to the prisoner, are in like manner conclusive evidence

against him; in what situation must the prisoners be, whose life, or liberty, or property, or fame rests on the judgments of Courts, which have no jurisdiction over them in the predicament in which they stand? and in what situation are the Judges of the Common Law, who must condemn, on the word of an Ecclesiastical Judge, without exercising any judgment of their own.

The Spiritual Court alone can deprive a clergyman. Felony is a good cause of deprivation: yet in Lord Hobart's Reports it is held, that they cannot proceed to deprive for felony, before the felony has been tried at law; and although, after conviction, they may act upon that, and make the conviction a ground of deprivation, neither side can prove or disprove anything against the verdict; because, as that very learned judge declares, "it would be to determine, though not capitally, upon a capital crime, and thereby judge of the nature of the crime, and the validity of the proofs; neither of which belongs to them to do."

If, therefore, such a sentence, even upon a matter within their jurisdiction, and before a felony committed, should be conclusive evidence on a trial for felony committed after, the opinion of a Judge, incompetent to the purpose, resulting (for aught appears) from incompetent proofs (as suppose the suppletory oath) will direct, or rule, a Jury and a Court of competent jurisdiction, without confronting any witnesses, or hearing any proofs: for the question supposes, and the truth is, that the Temporal Court does not and cannot examine, whether the sentence is a just conclusion from the case, either in law or fact; and the difficulty will not be removed by presuming that every Court determines rightly, because it must be presumed too, that the parties did right in bringing the full and true case before the Court; and if they did, still the Court will have determined rightly by ecclesiastical laws and rules, and not by those laws and rules by which criminals are to stand or fall in this country.

If the reason for receiving such sentence is, because it is the judgment of a Court competent to the inquiry then before them; from the same reason, the determination of two Justices of the Peace upon the fact or validity of a marriage, in adjudging a place of settlement, may hereafter be offered as evidence, and give the law to the highest Court of criminal jurisdiction.

But if a direct sentence upon the identical question, in a matrimonial cause, should be admitted as evidence (though such sentence against the marriage has not the force of a final decision, that there was none), yet a cause of jactitation is of a different nature; it is ranked as a cause of defamation only, and not as a matrimonial cause, unless where the defendant pleads a marriage; and whether it continues a matrimonial cause throughout, as some say, or ceases to be so on failure of proving a marriage, as others have said, still the sentence has only a negative and qualified effect, viz. "that the party has failed in his proof, and that the libellant is free from all matrimonial contract, as far as yet appears;" leaving it open to new proofs of the same marriage in the same cause, or to any proofs of that or any other marriage in another cause: and if such sentence is no plea to a new suit there, and does not conclude the Court which pronounces, it cannot conclude a Court, which receives the sentence, from going into new proofs to make out that or any other marriage.

So that admitting the sentence in its full extent and import, it only proves, that it did not yet appear that they were married, and not that they were not married at all; and, by the rule laid down by Lord Chief Justice *Holt*, such sentence can be no proof of anything to be inferred by argument from it; and therefore it is not to be inferred, that there was no marriage at any time or place, because the Court had not then sufficient evidence to prove a marriage at a particular time and place. That sentence, and this judgment, may stand well together, and both propositions be equally true: it may be true, that the Spiritual Court had not then sufficient proof of the marriage specified, and that your lordships may now, unfortunately, find sufficient proof of some marriage.

But if it was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the Court, and not to be impeached from within; yet, like all other acts of the highest judicial authority, it is impeachable from without: although it is not permitted to show that the Court was mistaken, it may be shown that they were misled.

Fraud is an extrinsic, collateral act; which vitiates the most solemn proceedings of Courts of Justice. Lord *Coke* says, it avoids all judicial acts, ecclesiastical or temporal.

In civil suits all strangers may falsify, for covin, either fines, or real or feigned recoveries; and even a recovery by a just title, if collusion was practised to prevent a fair defence; and this, whether the covin is apparent upon the record, as not essoining, or not demanding the view, or by suffering judgment by confession or default; or extrinsic, as not pleading a release, collateral warranty, or other advantageous pleas.

In criminal proceedings, if an offender is convicted of felony on confession, or is outlawed, not only the time of the felony, but the felony itself, may be traversed by a purchaser, whose conveyance would be affected as it stands; and, even after a conviction by verdict, he may traverse the time.

In the proceedings of the Ecclesiastical Court the same rule holds. In *Dyer* there is an instance of a second administration, fraudulently obtained, to defeat an execution at law against the first; and the fact being admitted by demurrer, the Court pronounced against the fraudulent administration. In another instance, an administration had been fraudulently revoked; and the fact being denied, issue was joined upon it; and the collusion being found by a Jury, the Court gave judgment against it.

In the more modern cases, the question seems to have been, whether the parties should be permitted to prove collusion; and not seeming to doubt but that strangers might. So that collusion, being a matter extrinsic of the cause, may be imputed by a stranger, and tried by a jury, and determined by the Courts of Temporal Jurisdiction.

And if a fraud will vitiate the judicial acts of the Temporal Courts, there seems as much reason to prevent the mischiefs arising from collusion in the Ecclesiastical Courts, which, from the nature of their proceedings, are at least as much exposed, and which find we have been, in fact, as much exposed, to be practised upon for sinister purposes, as the Courts in Westminster-hall.

We are therefore unanimously of opinion:

First, that a sentence in the Spiritual Court against a marriage in a suit of jactitation of marriage is not conclusive evidence, so as to stop the counsel for the Crown from proving the marriage in an indictment for polygamy.

But secondly, admitting such sentence to be conclusive

upon such indictment, the counsel for the Crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion.

Die Sabbati, 20 *Aprilis*, 1776.

Ordered by the Lords Spiritual and Temporal in parliament assembled, that the Lord Chief Justice of the Court of Common Pleas be, and he is hereby desired to favour this House with a copy of his Argument upon the Questions proposed to the Judges by this House yesterday.

HUGHES *v.* CORNELIUS.

TRIN. 32 *CAR.* 2.—*B. R.*

[REPORTED 2 SHOWER, 232.]

The sentence in a foreign Court of Admiralty decreeing a ship to be lawful prize, is conclusive; and therefore, though erroneous, the owner cannot recover the ship back by trover against the vendee.

TROVER brought for a ship and goods, and on a special verdict there is found a sentence in the Admiralty Court in France, which was with the defendant.

And now *per curiam* agreed and adjudged, that as we are to take notice of a sentence in the Admiralty here, so ought we of those abroad in other nations, and we must not set them at large again, for otherwise the merchants would be in a pleasant condition! for suppose a decree here in the Exchequer, and the goods happen to be carried into another nation, should the courts abroad unravel this? It is but agreeable with the law of nations that we should take notice and approve of the laws of their countries in such particulars. If you are aggrieved, you must apply yourself to the king and council; it being a matter of government, he will recommend it to his liege ambassador if he see cause; and if not remedied, he may grant letters of marque and reprisal.

And this case was so resolved by all the Court upon solemn debate; this being of an English ship taken by the French, and as a Dutch ship in time of war between the Dutch and the French.

Judgment for the defendants.

TREVIVAN *v.* LAWRENCE, *et alios.*

MICH. 3 *ANNE.—B. R.*

[REPORTED SAL. 276.]

Estoppel.

Mod. Cases, 256. Scire facias against tertenants reciting the judgment of a wrong Term, and upon nul tiel record judgment for the plaintiff; and after elegit, ejectment brought; the defendant is estopped to take advantage of the variance.

IN ejectment upon the demise of R. V., a special verdict was found, viz. that S. R. was seised in fee of the lands in question, and that being so seised H. M. recovered judgment against him in debt for 127*l.*, in B. R. in Michaelmas Term 1656, which they find *in hæc verba*:—That in Hilary, 13 W. 3, the lessor of the plaintiff, as administrator of the said H. M., sued a *scire facias*, reciting the judgment as of Trinity Term, against the tertenants of the lands which the said S. R. had on the day of the judgment recovered, or at any time afterwards. That the tertenants (of which the defendant was one) appeared and pleaded *nul tiel* record, and issue joined thereupon; and a day was given to bring in the record, at which day the record of the judgment of Michaelmas Term 1656, was produced, and judgment given *quod habetur tale recordum*, and execution awarded: That thereupon the plaintiff sued out an *elegit*, upon which an inquisition was taken, and the lands in question extended; and for the variance between the judgment recited in the *scire facias*, and that given in evidence, the Jury doubted. After argument, and consideration from Easter Term to Michaelmas, the Court held, that the defendants were estopped by this judgment in the *scire facias*, to say that there was no judgment in Trinity Term, because that matter had been tried against them, and the defendants were concluded to falsify the judgment in the point tried. Thus, if a *scire facias* be brought against the issue in tail, upon a judgment in debt against the ancestor, and he being warned makes default, he shall not come

1 Sid. 54. Raym. 19. 1 Lev. 41. 1 Keb. 112, 141.

afterwards and say that he is tenant in tail; so if he plead any other matter, and it is found against him. Also they held the judgment upon the *scire facias* is sufficient title in the ejectment, and the first judgment need not be given in evidence.

Where estoppel works on the interest of the land, it runs with it, and is a title.
1 Lev. 43.
2 Mod. 115.
2 Keb. 364.
Mod. Cases 258.
Raym. 21.
March, 64. pl. 99.

2dly. The Court held, not only that the parties, but all claiming under them, or this recovery, would be bound by this estoppel. As if a man make a lease by indenture of D., in which he hath nothing, and after purchases D. in fee, and after bargains and sells it to A. and his heirs, A. shall be bound by this estoppel; and that where an estoppel works on the interest of the lands, it runs with the land into whose hands soever the land comes, and an ejectment is maintainable upon the mere estoppel.

Jury is bound by estoppel, unless the party leaves the fact at large by pleading.

3dly. The Court held, that not only the parties, and all claiming under them, but the Court and Jury were bound by this estoppel, and that the Jury cannot find against this estoppel; and the Court took this difference, that where the plaintiff's title is by estoppel, and the defendant pleads the general issue, the Jury are bound by the estoppel; for here is a title in the plaintiff that is a good title in law, and a good title if the matter had been disclosed and relied on in pleading; but if the defendant pleads the special matter, and the plaintiff will not rely on the estoppel when he may, but take issue on the fact the Jury shall not be bound by the estoppel, for then they are to find the truth of the fact which is against him. Thus, in debt for rent on an indenture of lease, if the defendant plead *nil debet*, he cannot give in evidence, that the plaintiff had nothing in the tenements; because, if he had pleaded that specially, the plaintiff might have replied the indenture and estopped him; but if the defendant plead *nihil habuit*, &c., and the plaintiff will not rely on the estoppel, but reply *habuit*, &c., he waives the estoppel and leaves it at large, and the Jury shall find the truth notwithstanding his indenture.

Moor, 323.
Lut. 510, 1644.
Co. Litt. 47 b.
2 Co. 4, 5.

It is intended in this note to offer one or two remarks upon the nature of *estoppels*, a head of law once tortured into a variety of absurd refinements, but now almost reduced to consonancy with the rules of common sense and justice. The definition of *estoppel* given by Lord *Coke* is, to be sure, a little startling:—"*An estoppel is where a man is concluded by his own act or acceptance to say the truth.*" And,

certainly, in our old law books, truth appears to have been frequently shut out by the intervention of an estoppel, where reason and good policy required that it should be admitted. However, notwithstanding the unpromising definition of the word *estoppel*, it is in nowise unjust or unreasonable, but, on the contrary, in the highest degree reasonable and just, that some solemn mode of declaration should be provided by law for the purpose of enabling men to bind themselves to the good faith and truth of representations on which other persons are to act. *Interest reipublicæ ut sit finis litium.* But, if matters which have been once solemnly decided were to be again drawn into controversy, if facts once solemnly affirmed were to be again denied whenever the affirmant saw his opportunity, the end would never be of litigation and confusion. It is wise, therefore, to provide certain means by which a man may be concluded, not from saying the truth, but from saying that that, which, by the intervention of himself, has once become accredited for truth, is false. And probably no code, however rude, ever existed without some such provision for the security of men acting, as all men must, upon the representations of others.

"Touching *estoppels*," says Lord *Coke*, "which are a curious and excellent sort of learning, it is to be observed, that there be three kinds of estoppels; viz. *by matter of record, by matter in writing, and by matter in pais*." Although his lordship uses the word 'writing,' it is clear that the writing which is to operate as an estoppel must be a *deed*.—See *Stratton* v. *Rastall*, 2 T. R. 366; *Lampon* v. *Corke*, 5 B. & A. 611; *Greaves* v. *Key*, 3 B. & Ad. 313. Estoppels, therefore, are—

1. *By matter of record.*
2. *By deed.*
3. *In pais.*

A number of instances of *estoppel by matter of record* are to be found in the old books, which all serve to illustrate one proposition, viz. that a record imports such absolute verity that no person against whom it is producible shall be permitted to aver against it. One of the latest instances of this occurred in *R.* v. *Carlile*, 2 B. & Adol. 262. In that case, the defendant had been convicted of a seditious libel, and brought a writ of error in the Queen's Bench, assigning for error in fact, that there was but one of the justices named in the commission present when the jury gave their verdict. On the record returned to the King's Bench, (and which was made up in the ordinary way,) it appeared that a sufficient number of the justices were present, and the court held that it was not competent to the defendant to question the fact so stated. "The authorities," said Lord *Tenterden*, delivering the judgment of the court, "are clear that a party cannot be received to aver as error in fact, a matter contrary to the record." In 1 Inst. 260, Lord *Coke* says:—"The rolls being the records or memorials of the judges of the courts of record, import in them such incontrollable credit and verity, as they admit of no averment, plea, or proof to the contrary. And if such a record be alleged, and it be pleaded that there is no such record, it shall be tried only by itself; and the reason hereof is apparent, for otherwise (as our old authors say, and that truly) there should never be any end of controversies, which should be inconvenient." "The cases from *Yelverton* and Sir *Thomas Raymond*, (*King* v. *Gosper*, Yelv. 58; *Okeover* v. *Overbury*, T. Raym. 231), are direct authorities upon this point, as well as that for which they were cited; and one of the instances put by Lord *Hale*, viz. that the court was not sitting, is very like the present case." Other cases were quoted at the bar upon this point; *Whistler* v. *Lee*, Cro. Jac. 559; *Palmer* v. *Webb*, 2 Lord Ray, 1415, and the authorities in Bac. Abr. tit. Error, and it is unnecessary to repeat them; but it may be proper to observe, that one of them, viz. *Molins* v. *Werby*, 1 Lev. 76, 1 Sid. 94, 1 Keble 355, is quite analogous to the present. That was a writ of error on a judgment in the Palace Court, said to be holden before James Duke of Ormond: the error assigned was, that the court was not holden before the Duke, but before his deputy; and this was held not assignable, being contrary to the record. In the case of *Bowsse* v. *Cannington*, Cro. Jac. 244, the error assigned was, that one W. B., of Bradfield, was returned

upon the jury process; and one W. B., of Methfeld, who was another person, and not returned, was sworn. And this was held not assignable for error, because contrary to the record, and the party estopped; for, otherwise, every record might be brought in question upon such surmise. I will mention one more case only, viz. *Cole* v. *Green*, 1 Lev. 309. An action of waste was brought in the Court of Hustings of the city of London: there were two trials; upon the first, the verdict was for the plaintiff, and upon the second for the defendant, and the judgment was given for the defendant. The plaintiff brought a writ of error, which was heard before several of the judges assigned for that purpose in St. Martin's le Grand; the errors there assigned are not applicable to the present case. The judgment given for the defendant in the Hustings was reversed, and judgment given for the plaintiff on the first verdict. Upon this reversal of the judgment, the original defendant brought a writ of error in the House of Lords, and there assigned for error that the jury did not come out of the four nearest wards, as by the custom of London they ought to do. The defendant in error pleaded *in nullo est erratum*, and upon argument, the Lords, with the advice of the judges, resolved,—first, that this was not assignable for error, being contrary to the record, because the award of the *venire facias* is out of the four nearest wards, and the writ returned served accordingly; and secondly, that *in nullo est erratum* is a demurrer; and although there be error in fact, that is not confessed by the demurrer, it not being assignable, but the demurrer upon it is in point of law, because not assignable, and the judgment given at St. Martin's was affirmed. This is a judgment pronounced by the highest tribunal of the country; the matter is settled, as I have before observed, by a series of decisions, and the rules in this respect have been perfectly established, and long known and received as law in Westminster Hall. For these reasons the judgment of the court below must be affirmed." See also *Reed* v. *Jackson*, 1 East. 355, where the court would not permit evidence to be given that the verdict had been entered by a mistake of the associate. To a similar effect are *R.* v. *Shaw*, R. & R. C. C. 526; *Leighton* v. *Leighton*, 1 Str. 210.

However, this conclusive effect of a record is limited by certain rules and considerations. Several cases are mentioned in Com. Di. *Estoppel*, E. 1 to E. 10, (most of which will be found to apply not merely to an estoppel by record, but to all cases of estoppel whatever,) in which it does not operate conclusively. For instance—

1. *Where the record is coram non judice.* As, if the record were of an indictment purporting to have been determined in the Common Pleas a court having no criminal jurisdiction.

2. *Where the truth appears in the same record* (Co. Litt. 352, *b*). As, for instance, where the record shows that a judgment which is relied upon as an estoppel has been reversed in error.

3. *Where the thing averred is consistent with the record,*—which is, indeed, no exception at all.

4. *Where the allegation in the record is uncertain.* For an estoppel, not being favoured by the law, ought to be certain to every intent; Co. Litt. 352 *b*, 303 *a*. And therefore, "if a thing be not directly and precisely alleged, it shall be no estoppel;" Co. Litt. 352 *b*.

5. *Or is alleged merely by way of supposal.* The words used by Lord *Coke* are, "Matters alleged by way of supposal in counts shall not conclude after nonsuit. Otherwise, it is after judgment given. And, after nonsuit, albeit the supposal in the count shall not conclude, yet the barre, title, replication, or other pleading, of either party, which is precisely alleged, shall conclude after nonsuit, and hereby are the books reconciled." Co. Litt. 352 *b*.

Or, 6. *Is not traversable or material.*—See *Attorney Gen.* v. *King*, 5 Price 195; and see Co. Litt. 352 *b*. As, for instance, the day in an indictment.

Or. 7. *Where there is an estoppel against an estoppel.* For, to use the expression of Lord *Coke*, "estoppel against estoppel setteth the matter at large."

But the principal limitation to the conclusive effect of a record is that arising from the consideration that it is, in most

cases, not binding, or even evidence, as between all persons.

Questions of this sort usually arise on *judgments*, they being by far the most extensive species of records. With regard to their conclusive effect, they may be divided into two classes:

1. Judgments *in rem.*

2. Judgments *in personam;* or perhaps it would be more accurate to say *inter partes*, since, as will presently be pointed out more clearly, an adjudication upon the *status* of a particular person is as much entitled to the conclusive effect of a judgment *in rem*, as is an adjudication on the *status* of a particular inanimate thing.

With regard to both these classes one observation may be made, viz. that, for the mere purpose of proving the existence of a judgment, the production of a record of either sort is conclusive upon all the world. Thus, though a judgment against A. is, generally speaking, no evidence against B., yet, where A. sues B. for negligence as his agent, he may, to prove the consequences of the negligence to himself, produce the record of a judgment obtained against him by a third party, in an action brought in consequence of that negligence. The verdict in such case, to use the expressions of the court in *Green* v. *New River Company*, 4 T. R. 590, *is evidence as to the quantum of damages, though not as to the fact of the injury.* See also *R.* v. *Hebden*, B. N. P. 231.

But, in the great majority of cases, the record of the judgment is produced in evidence, not for the purpose of proving the bare fact of its own existence, but for that of concluding some party upon the point adjudicated. And here arises the distinction, above adverted to, between judgments *in rem* and judgments *inter partes;* the former having this conclusive effect, as between all persons whatever; the effect of the latter being much more limited.

A judgment *in rem* I conceive to be an adjudication pronounced (as its name indeed denotes) upon the *status* of some particular subject matter, by a tribunal having competent authority for that purpose. Such an adjudication, being a most solemn declaration from the proper and accredited quarter, that the *status* of the thing adjudicated upon is as declared, concludes all persons from saying that the *status* of the thing adjudicated upon was not such as declared by the adjudication.

The principal examples of the effect of judgments *in rem* occur in the Spiritual and Admiralty Courts, and will, in a subsequent part of the note, be adverted to. We are now upon the judgments of courts, strictly speaking, of record; and, among these, some instances may be found of decisions *in rem.* Thus, the Court of Exchequer having, in certain revenue cases, a right to condemn goods, its judgment is conclusive against all the world, that the goods so condemned were liable to seizure. "Where," said Lord Kenyon, in *Geyer* v. *Aguilar*, 7 T. R. 696, "there has been a proceeding in the Exchequer, and a judgment *in rem*, so long as the judgment remains in force, it is obligatory upon the parties who have civil rights depending on the same question." See also B. N. P. 244; and see the elaborate judgment in *Scott* v. *Shearman*, 2 Bl. 977. And the very qualification of this rule furnishes the best illustration of the general principle; for, though the condemnation of the *goods* is thus conclusive, because it is a proceeding *in rem*, yet a conviction of the *person* committing the illegality, though by the same court and concerning the same transaction, is not so, because that is a proceeding *in personam.* *Hart* v. *Macnamara*, 4 Price 154, *note.* As to the effect of an *acquittal* of goods in the Exchequer, see *Cooke* v. *Sholl*, 5 T. R. 255.

The reader will sometimes find *dicta*, from which he might be induced to infer, that, in order that a judgment *in rem* may have this binding effect, it must be the judgment of a court of *exclusive jurisdiction.*

It is submitted, however, that this proposition cannot be maintained. The universal effect of a judgment *in rem* depends, it is submitted, on this principle, viz. that it is a solemn declaration, proceeding from an accredited quarter concerning the *status* of the thing adjudicated upon; *which very declaration operates accordingly upon the status of the thing ad-*

judicated upon, and, *ipso facto*, renders it such as it is thereby declared to be. Thus a condemnation of goods in the Exchequer not merely declares the goods to be liable to forfeiture, but accomplishes the forfeiture accordingly. A sentence in the Prize Court not merely declares the vessel prize, but vests it in the captors. Now, when the *status* of the thing is thus altered, it seems to follow, as a necessary consequence, that the sentence altering it must conclude all the world; for how vain would it be to try an issue, whether the thing be or be not as decreed, when the decree has already not only declared, but rendered it such? To this point tend the observations of the court in *Scott* v. *Shearman*, where the judgment *in rem* is held to be conclusive in the action, "because the property of the goods being changed, and irrevocably vested in the Crown by the judgment of condemnation, it follows, as a necessary consequence, that neither trespass nor trover can be maintained for taking them in an orderly manner." And it is submitted that this must be Lord *Coke's* meaning, where he states in 1 Inst. 352 *b*, that "where the record of the estoppel doth run to the disabilitie or legitimation of the person, there all strangers shall take benefit of that record, as *outlawrie*, *excommengement*, *profession*, *attainder of præmunire*, *&c. felonie*, *&c.*, *bastardie*, *mulier-tie*, and shall conclude the parties, *though they be strangers to the record*." In all these cases, it will be observed, the record operates upon the *status* of the individual. Thus judgment of *outlawrie* not merely declares the party an outlaw, but renders him so, and is, therefore, as it is submitted, a judgment *in rem*, and resembles the act of the Ecclesiastical Court depriving a man of his preferment or conferring on him the new character of an administrator.

Now if this *be* the principle, it seems impossible to say that where the *status* of the thing is actually operated on, that operation shall be of less effect because some other court, had it been called upon, might have produced a similar one. It is admitted that it may happen that, after a court of competent jurisdiction has decreed *in rem*, some other court proceeding likewise *in rem*, may pronounce a contrary decree on the same subject-matter. But it is submitted, that such second court arrogates to itself a power of *appeal*, and that it is only viewed in the light of a judgment of a court of appeal that its decision can be looked upon as warrantable.

With regard to these judgments *in rem*, it is scarce necessary further to observe, that they, like all others, fall within the rule laid down by Chief Baron *Comyn*, and above cited; and are conclusive as to nothing which might have not been in question, or was not material. *Attorney-General* v. *King*, 5 Price 195.

Next, with regard to the judgment of a court of record *inter partes*.

The great maxim which governs its effect is,—*Res inter alios acta alteri nocere non debet*. The rule laid down in the celebrated judgment of *De Grey*, C. J. is, it will be recollected, that the judgment is conclusive between *the same parties*. In *Buller's Nisi Prius*, 233, the rule, and the reason for the rule, are stated to be that "the verdict ought to be between the same parties, because, otherwise, a man might be bound by a decision, who had not the liberty to cross-examine; and nothing can be more contrary to natural justice, than that a man should be injured by a determination that he, *or those under whom he claims*, was not at liberty to controvert." To the same effect is *Comyn's* Di. tit. *Estoppel*, Co. Litt. 352, and *Gaunt* v. *Wainman*, 3 Bingh. N. C. 69, *ubi per Tindal*, C. J. "According to Co. Litt. 352 *a*, every estoppel ought to be *reciprocal*; and that is the reason that, regularly, a stranger shall neither take advantage of nor be bound by the estoppel." It would be hard, indeed, if it were otherwise." See, too, in the case of a deed, *Doe* d. *Marchant* v. *Errington*, 6 Bing. N. C. 79.

The words above printed in italics from the passage in *Buller* give the proper expression of the extent to which estoppels are permitted under this rule. It would be hard, it is remarked, "that a man should be injured by a determination that he, *or those under whom he claims*, was not at liberty to controvert."

There is, however, no hardship in holding that a man shall be bound by that which would have bound those under whom he claims *quoad* the subject-matter

of the claim; for *qui sentit commodum sentire debet et onus*, and no man can, except in certain cases excepted by the statute law and the law merchant, transfer to another a better right than he himself possesses.

The record, therefore, of a verdict followed by a judgment in a suit *inter partes* will estop,

1. *Parties*—and
2. *Privies* thereto.

One of the chief authorities as to the effect of a previous verdict in an action *inter partes* is *Outram* v. *Morewood*, 3 East, 346, in which the principles and authorities on which this part of the law of estoppel depends are stated with great force, learning, and clearness, by the L. C. J. In *Outram* v. *Morewood*, the declaration against Morewood and Ellen his wife was in trespass, for breaking and entering the Cow Close, and digging coal there.

Plea 2. That on the 2d of November, 38 Eliz., John Zouch was seised in fee of the *locus in quo*, and levied a fine to the use of Roper and others in fee, who suffered a recovery to the use, as to the coal, of John Zouch for eighty years, *si tamdiu vixerit*, remainder to John Zouch junior (his son) in tail male, remainder to John Zouch junior in fee; that John Zouch senior died, and that John Zouch junior conveyed by bargain and sale to Johnson, Turner, and Meymoth in fee; *that the coal mentioned in the declaration was part of the coal so bargained and sold*, and that John Zouch, junior, afterwards died without issue. Title was then *derived* from Johnson, Turner, and Meymoth, to George Morewood, who devised to the defendant Ellen in fee, and died seised, after which the defendant Ellen intermarried with the other defendant. Wherefore, &c.

Replication. That the defendants ought not to be admitted to aver that the coal mentioned in the declaration was part of the coal bargained and sold, because, in E. 32, G. 3, the plaintiff sued the defendant Ellen in trespass for breaking and entering the same identical coal-mine. That the said Ellen pleaded title as above, and averred that the coal in the declaration in that action mentioned *was part of the coal bargained and sold as aforesaid.* That the plaintiff traversed the last-mentioned averment, that issue was joined on that traverse, and the issue found for the plaintiff, and that judgment thereupon followed, and so the plaintiff prayed judgment, *si*, &c.

Demurrer and *Joinder.*

The replication was held good. "The question," said Lord *Ellenborough*, C. J., "is *whether the defendants, the husband and wife, are estopped by this verdict and judgment from averring, contrary to the title there found against the wife, that the coal-mines now in question are parcel of the coal-mines bargained and sold by the indenture above mentioned.* The operation and effect of this finding, if it operate at all as a conclusive bar, must be by way of estoppel. If the wife were bound by this finding, as an estoppel, and precluded from averring the contrary of what was then so found, the husband, in respect of his privity, either in estate or in law, would be equally bound, according to what is said in Co. Litt. 352 *a*. 'Privies in estate, as the feoffee, lessee, &c.—privies in law, as the lords by escheat, tenant by the courtesy, tenant in dower, the incumbent of a benefice, and others that come in by act in law in the *post*, shall be bound by and take advantage of estoppels.' The question then is, Is the wife herself estopped by this former finding to aver the contrary? In Brooke, tit. *Estoppels*, pl. 15, (who cites 33 H. 6, 7, 19, 50; and see also Bro. Estate, 158, 2 E. 4, 17,) it is said to be 'agreed that all the records in which the freehold comes in debate shall be estopped with the land, and run with the land, so that a man may plead this as party, or as heir, as privy, or by que estate.' But if it be said, that by 'the freehold coming in debate,' must be meant a question respecting the same, in a suit in which the freehold is immediately recoverable as in an assise or writ of entry, I answer that a recovery in any one suit upon issue joined on matter of title, is equally conclusive upon the subject-matter of such title, and that a finding upon title in trespass not only operates as a bar to the future recovery of damages for a trespass founded on the same injury, but also operates by

way of estoppel to any action for an injury to the same supposed right of possession."

His lordship cited a case reported in 3 Leon. 194, in support of the above view, and, after commenting upon the authorities relied upon as sustaining the contrary doctrine and showing that no one of them negatived the conclusiveness of a verdict found on any precise point once put in issue between the same parties or their privies, concluded by saying,—"The cases adverted to by Lord Hale, and which have been fully explained and enforced by the defendant's counsel, together with the other authorities on the subject of protestation and estoppel, cited from Bro. Abr. *Protestation*, pl. 9,—Fitzherbert, *Estoppel*, pl. 20, are, in our opinion, as well as upon the reason and convenience of the thing, and the analogy to the rules of law in other cases, decisive *that the husband and wife, the defendants in this case, are estopped by the former verdict and judgment on the same point in the action of trespass, to which the wife was a party, from averring that the coal-mines in question are parcel of the coal-mines bargained and sold by Sir John Zouch*, and consequently that the plaintiff ought to recover."

See further,—*Ward* v. *Wilkinson*, 4 B. & A. 412; *Simpson* v. *Pickering*, 1 C. M. & R. 529; and *Eastmure* v. *Lawes*, 5 Bingh. N. C. 450; from which last case it appears, as was indeed always clear on principle, that a verdict negativing the right of a defendant stated in his plea, ex. gr. of set-off, estops him in a subsequent action from asserting that right as plaintiff against the same party. It was an action of debt with the common counts for money had and received, money paid, and on an account stated. The *plea* stated that the defendant in this action having formerly sued the plaintiff, he pleaded the present demand by way of set-off, and that a verdict was found against the set-off. *Replication*. That no evidence was offered in support of the said plea of set-off. *Demurrer* thereupon. "And the question," said his lordship, "is whether, after a precise issue has been found against the plaintiff, he may bring an action, and agitate the whole matter over again." . . . "Consistently with the decision in *Outram* v. *Morewood*, I cannot see how an estoppel can be set aside on the ground set forth in this replication."

It must be observed, however, that a verdict against a man suing in one capacity will not estop him when he sues in another distinct capacity, and, in fact, as a different person in law. *Robinson's* case 5 Rep. 32 b; Com. Di. *Estoppel*, C.

With regard to the effect of the estoppel upon *privies*.—Privies are divided by Lord Coke into three classes:

1. Privies in blood.
2. Privies in law.
3. Privies by estate.

The doctrine of estoppel, however, so far as it applies to persons falling under each of these three denominations, applies to them on one and the same principle; namely, that a party claiming *through* another is estopped by that which estopped that other respecting the same subject-matter. Thus, an heir who is *privy in blood* would be estopped by a verdict against his ancestor through whom he claims. *Locke* v. *Norborne*, 3 Mod. 141. An executor or administrator, suing as such, would be bound by a verdict against his testator or intestate to whom he is *privy in law*. *R.* v. *Hebden*, And. 389. Lord Coke tells us in the passage cited by Lord Ellenborough in *Outram* v. *Morewood*, that "the lord by escheat, the tenant by the curtesy, the tenant in dower, and the incumbent of a benefice, shall be bound by and shall take advantage of estoppels;" Co. Litt. 352 b. It will have been seen, that, in that very case, it was decided that a verdict against a wife would bind the future husband. And see Lord *Kenyon's* observations in *Rex* v. *Mayor of York*, 5 T. R. (the *dictum* referred to is at page 72; *sed vide R.* v. *Grimes*, 5 Burr. 2601). With regard to *privies in estate*.—It is apprehended that a verdict against the feoffor would estop the feoffee; and against the lessor, the lessee; *et sic de similibus*. *Blakemore* v. *Glamorganshire Canal Co.*, 2 C. M. & Ros. 133 (where, however, the question was merely as to the admissibility of the verdict in evidence). And see the cases of *fines* which proceed on the same principle, being, like judgments after verdict, *estoppels of record*; e. g. *Helps* v. *Here-*

ford, 2 B. & A. 242, and the authorities cited in the argument there.

In *Doe* v. *Earl of Derby*, 1 Ad. & Ell. 783, (which was also a case not of estoppel, but of admissibility,) Mr. Justice *Littledale* remarks, at page 790, "A passage has been cited from Comyn's Di. *Evidence*, A. 5, where it is said, that 'a verdict in another action, for the same cause, shall be allowed to be evidence between the same parties. So it shall be evidence when the verdict was for one under whom any of the present parties claim.' *But that must mean a claim acquired through such party subsequently to the verdict.*"

It need hardly be remarked, that the effect of verdicts, whether upon parties or privies, altogether depends on the question, *whether the same point was in issue*. A verdict between two parties upon one question can, of course, have no binding effect in an issue joined between them on another. (See B. N. P. 233.) Nor will the verdict be admissible, unless it appears clear that the same point actually *was* in issue. It is not sufficient that it *might have been so*. See the expressions of Lord *Ellenborough* in *Outram* v. *Morewood*, *ubi supra*, where, speaking of the verdict in *Evelyn* v. *Harries*, his lordship says, that "it could not have been pleaded by way of estoppel, *because no issue was taken in the first action upon any precise point, which is necessary to constitute an estoppel in the second action.*"

However, it is not necessary that the point on which it is sought to estop should have been *the only one in issue* on the previous occasion. It is enough if it be one which *must* have been decided. *Rex* v. *St. Pancras*, Peake 219. Nor need the form of action be the same in each case. *Cleve* v. *Powell*, 1 M. & Rob. 228; *Kitchen* v. *Campbell*, 2 Bl. 830, a case, also, of the admissibility of a verdict in evidence, but the principle is the same. See for a case in which an estoppel by deed was prevented from arising by the want of sufficient precision, *Right* v. *Bucknell*, 2 B. & Adol. 278.

Having thus barely touched upon the question *between whom is the record an estoppel?* it appears right to devote a few words to the inquiry, *in what manner is the estoppel, where it exists, to be made available?* Now, upon this question, an opinion has of late prevailed that, in order to render a verdict conclusive by way of estoppel, it must be pleaded as such. This opinion seems to have originated in the language of *Goddard's* case, 2 Co. 4 b. In that case, Goddard, administrator of Newton, brought an action against Denton on a bond made to his intestate, dated 4th April, 24 Eliz. The defendant pleaded that the intestate died before the date of the bond, and so that it was not his deed; on which the plaintiff took issue; and the jury found specially that the bond was delivered on the 30th of July, 23 Eliz., by the defendant, but that the intestate died before the date; and the court gave judgment for the plaintiff.

This *decision*, it is obvious, does by no means necessarily involve the point under discussion, for the *date* was immaterial to the issue joined on *non est factum*; and Lord *Coke*, in the same case, expressly tells us that, had the deed had an impossible date, it would still be good and take effect by the delivery. Now, if the deed might be the defendant's deed, and yet the date impossible, it follows that the impossibility of the date could not estop the plaintiff in an issue joined on *non est factum*. But Lord *Coke* states that the reason of the judgment was, that although "the obligee in pleading cannot allege the delivery before the date, as was adjudged in 12 Hen. 6. 1, which case was affirmed to be good law, because he is estopped to take an averment against anything expressed in the deed; yet the jurors, who are sworn to say the truth, shall not be estopped; for an estoppel is to conclude one to say the truth, and therefore jurors cannot be estopped, *because they are sworn to say the truth.*" It must, however, be observed, that the jurors are *not* sworn *to say the truth*, but a true verdict to give *according to the evidence*. Now an estoppel precludes the party estopped from offering any evidence to the contrary; and it appears difficult to see in what manner the oath of a juror can be opposed to the rule, that a record shall prevent the party against whom it is offered in evidence from producing other evidence to controvert it, and that, all the evidence

being thus one way, namely, *with the record*, the jury shall be *bound* to give their verdict *for* the party with whom all the evidence is, and against the party in whose favour there is *no* evidence.

The *doctrine* in *Goddard's* case is cited without any remark in B. N. P. 298 b. But, notwithstanding, several cases occurred in which records and deeds seem to have been treated as *conclusive* when produced in evidence. The expressions of C. J. *De Grey*, in the Duchess of Kingston's case, will be found to be to that effect—the judgment, his lordship says, is, " in pleading, a bar, in evidence, *conclusive*." In *Aslin* v. *Parkin*, 2 Burr. 665, *ante*, vol. I., 264, the judgment in the action of ejectment is expressly stated to be conclusive in the subsequent action for mesne profits; and see *R.* v. *St. Pancras*, Peakes N. P. C. 219, (where a conviction against a parish for non-repairing was held *conclusive evidence* of liability upon a subsequent indictment). *Strutt* v. *Bovington*, 5 Esp. 57; and *Kitchen* v. *Campbell*, 2 Bl. 830.

At length came *Vooght* v. *Winch*, 2 B. & A. 662, on which the doctrine that seems to have obtained of late is mainly founded. In that case the declaration stated that the plaintiff was entitled to a mill and the benefit of a stream, and that the defendant widened and deepened a ditch leading out of the stream, and thereby diverted water from the mill to the damage thereof. The plea was not guilty. At the trial, the defendant gave in evidence the record of a former action for the same cause between the same parties, in which the plea had been the same, and the verdict for the defendant. That action was commenced in 1817. The declaration in the present case stated the grievances to have been committed on June 1, 1814, and on divers days and times between that day and the commencement of the present suit. The judge refused to hold that the record of this verdict was conclusive evidence against the plaintiff, and the court thought he was right in so holding.

It was assumed that the verdict would have been conclusive if pleaded. Whether it would have been so or no is perhaps therefore scarce worth inquiring. Possibly, had it been pleaded by way of estoppel, the plaintiff would have urged on a demurrer that, for aught that appeared, the former verdict might have proceeded, not on the question of right, but on the fact that the defendant had *then* committed no disturbance at all, and that such a verdict could not be conclusive in the present action; for that although he had not *then*, yet he might *since* have committed an actionable disturbance. (See *Few* v. *Backhouse*, 8 Ad. & Ell. 789). However, the learned counsel for the defendant urged that the former verdict *would* have been conclusive by way of estoppel, if so pleaded. The bench assumed throughout their judgment that it would have been so, and the judgment in *Vooght* v. *Winch* proceeds on that assumption.—" I am of opinion," said the Lord Chief Justice, " that the verdict and judgment obtained for the defendant in the former action was not conclusive evidence against the plaintiff on the plea of not guilty. It would, indeed, have been conclusive if pleaded in bar to the action by way of estoppel."

On the authority of *Vooght* v. *Winch* was decided *Doe* v. *Huddart*, 2 C. M. & R. 316, 5 Tyrwh. 846, in which the Court of Exchequer held that a judgment in ejectment was not conclusive in the action for mesne profits. That it is conclusive when pleaded by way of estoppel has been decided in *Doe* v. *Wright*, Trin. T. 1839, B. R.

It is submitted that the cases of *Vooght* v. *Winch* and *Doe* v. *Huddart*, are by no means at variance with the doctrine of L. C. J. *De Grey*; viz., that a judgment on the same point between the same parties is in pleading a bar, in *evidence*, *conclusive*. And it is submitted that the true meaning of this is, that it is conclusive as a plea *where there is an opportunity of pleading it*, but that *where there is no such opportunity, then it is conclusive as evidence:* and that *Vooght* v. *Winch* and *Doe* v. *Huddart* merely decide that a party may waive the benefit of an estoppel, and that he elects to waive it by not pleading it when he has an opportunity of doing so.

This doctrine is propounded with some confidence, because it was the doctrine of the court in *Trevivan* v. *Lawrence*, approved of by the *Common Pleas* in *Magrath* v. *Hardy*, 4 Bingh. N. C. 782, a case in which the estoppel was held to be

waived, the defendant having omitted to plead it as he might have done.

In an elaborate judgment delivered after a *Cur adv. vult*, the Lord Chief Justice comments on this subject as follows: —"The law on this point is laid down with great distinctness in the case of *Trevivan* v. *Lawrence*. The court, it is said, took this difference—that where the plaintiff's title is by estoppel and the defendant pleads the general issue, the jury are bound by the estoppel; for here is a title in the plaintiff that is a good title in law, and a good title if the matter had been disclosed and relied on in pleading; but, if the defendant pleads the special matter, and the plaintiff will not rely on the estoppel when he may, the jury shall not be bound by the estoppel, because they are to find the truth of the fact which is against him. Thus, in debt for rent on an indenture of lease, if the defendant plead *nil debet*, he cannot give in evidence that the plaintiff had nothing in the tenements; because, if he had pleaded that specially, the plaintiff might have replied the indenture and estopped him; but, if the defendant plead *nihil habuit*, &c. and the plaintiff will not rely on the estoppel but reply *habuit*, &c. he waives the *estoppel* and leaves it at large, and the jury shall find the truth notwithstanding the indenture."

And his lordship proceeds to state, that the judgment of the court, standing on this ground, is distinguishable from certain cases which had been cited at the bar, and in which the *estoppel* had been held available.

Adopting this distinction, it is submitted that all the decisions may be reconciled: for, as to *Vooght* v. *Winch*, that case proceeded on the express ground *that the defendant might have pleaded the estoppel*, on which circumstance each of the judges will be found to have expressly relied. In *Doe* v. *Huddart*, the prior judgment in ejectment might have been replied; for, though, previous to the rules of Hil. 1834, the plea of "*not guilty*" in trespass put the whole title in issue as well as the taking of the profits, and, therefore, where that plea was pleaded, the *estoppel* could not be replied, since it was uncertain whether the defendant meant to deny the plaintiff's title, on which alone he was concluded by the record of the ejectment, or to deny merely the taking of the profits; yet, as soon as by the rules of Hil. 1834, the issue of *not guilty* was narrowed and the plea that *the plaintiff never was possessed* became a usual one, the record in ejectment became pleadable in reply to that plea by way of estoppel, *Doe* v. *Wright*, Trin. 1839, B. R., and, of course, according to the rule in *Hardy* v. *Magrath* and *Trevivan* v. *Lawrence*, could not be conclusive in evidence, and was properly decided in *Doe* v. *Huddart* not to be so. The same observation disposes of *Bowman* v. *Rostrom*, 2 Ad. & Ell. 295, where a recital in a deed which might have been pleaded was held to be no estoppel in evidence.

If the law of estoppel be founded on justice and good sense—if it be true that *nemo debet bis vexari pro eâdem causâ*—it would be strange to say that the accidental form of an issue should deprive a party of the benefit of it, and force him to litigate the same question twice over.

Besides the judgments of courts of record there are certain other judicial proceedings which possess a conclusive effect, though not emanating from a court, strictly speaking, of record. I propose to mention one or two of these, which may, perhaps, without impropriety be designated as

Estoppels quasi of Record.

Decrees of the *High Court of Chancery* (which, although a superior court, seems not to be, at least upon its equity side, a court of record, see Co. Litt. 260,) stand, nevertheless, on the same level with the judgments of the three superior courts of common law. It is laid down in *Buller's Nisi Prius*, 243, that "a decree in Chancery may be given in evidence between the same parties, or any claiming under them, for their judgments must be of authority in those cases where the law gives them a jurisdiction; for it were very absurd that the law should give them a jurisdiction and yet not suffer what is done by force of that jurisdiction to be full proof. In the case of *Manchester Mills*, Dougl. 222. note 13, it was laid down by Lord Mansfield, that 'a decree

establishing a custom to send corn to be ground at a particular mill ought not to be controverted, nor the existence of the custom litigated any further before a jury; and that such decree bound all persons of the same description with the original defendants.'" See also *Trotter* v. *Blake*, 2 Mod. 231.

Judgments of the *Courts Ecclesiastical* are of two sorts—*in rem* and *inter partes*. A grant of *probate* or of *administration* is in the nature of a decree *in rem*, and actually invests the executor or administrator with the character which it declares to belong to him. Accordingly, such grant of probate or administration is conclusive against all the world. *Noel* v. *Wells*, 1 Lev. 235, 6. It may, indeed, be shown that the grant was revoked, for that is the further act of the same court, or that it was forged, for that shows it not to be the act of the court at all, or that it was granted by a court having no jurisdiction, for then it is a nonentity. But it cannot be shown that the testator was mad, or that *the will* was forged, for those facts might have been alleged in the Ecclesiastical Court in opposition to the grant of probate or administration. *Noel* v. *Wells*, *ubi supra*. On this ground it was that the Queen's Bench, in *Allen* v. *Dundas*, 3 T. R. 125, held, that payment of money to an executor who had obtained probate of a forged will, which was afterwards repealed, is a discharge to the party paying it; since, the probate being conclusive evidence of the executorship as long as it remained unrepealed, the debtor would, when he was called upon to pay, have had no defence against an action brought by the executor under the forged will. Mr. J. *Buller* in that case said, "The first question to be considered is, *what is the effect of a probate?* It has been contended by the counsel, first, that it is not a judicial act; and, secondly, that it is not conclusive. But I am most clearly of opinion that it is a judicial act; for the Ecclesiastical Court may hear and examine the witnesses on the different sides whether a will be or be not properly made. That is the only court which can pronounce whether or not the will is good, and the courts of common law have no jurisdiction over the subject. Secondly, the probate is conclusive till it is repealed; and no court of common law can admit evidence to impeach it. Then this case was compared to a probate of a supposed will of a living person: but in such a case the Ecclesiastical Courts have no jurisdiction, and their probate can have no effect; their jurisdiction is only to grant probate of the wills of dead persons. The distinction in this respect is this,—if they have jurisdiction, their sentence, as long as it stands unrepealed, shall avail in all other places; if they have no jurisdiction, their whole proceedings are a nullity."

On the same principle, a sentence in a matrimonial suit is conclusive, for it is an adjudication upon the *status* of the parties, see *Da Costa* v. *Villa Real*, Str. 961; *Bunting's* case, 4 Co. 29; *Kenn's* case, 7 Co. 42; and see the instances of sentences of deprivation collected by Lord *Holt* in his judgment in *Phillips* v. *Bury*, 2 T. R. 346. But it is otherwise when the suit is for a jactitation of marriage; for there the spiritual court does not intend to affect the *status* of the parties by its decree, but merely to prevent one party from falsely asserting that a marriage happened under certain specified circumstances. See the *Duchess of Kingston's* case, and quære as to *Jones* v. *Bow*, Carth. 225.

It need hardly be added, that such sentences do not, any more than the records of the superior courts, conclude as to matters which may or may not have been controverted. See *Blackham's* case, 1 Salk. 290.

It is laid down in the *Duchess of Kingston's* case that the decree of the spiritual court is not conclusive in a criminal proceeding; and this is stated to be upon grounds of public policy. It seems difficult, however, to support this view on principle. A sentence in the spiritual court *inter partes* could not indeed be conclusive in a criminal proceeding, because the parties litigant would not have been the same in both courts. But it is difficult to see how a decree *in rem*, which operates upon the *status* of the individual and *renders* the fact what the court adjudicates it to be—it is difficult, I say, to see how such a sentence can be otherwise than conclusive. In the *Duchess of Kingston's* case it was

unnecessary to decide this point, the sentence being *in personam.* In *R.* v. *Buttery,* R. & R. C. C. 342, a probate was held not to be conclusive evidence that the party who obtained it had not forged the will, which may at first sight seem inconsistent with the doctrine in *Noel* v. *Wells,* 1 Lev. 236, above cited; viz., that the party in a civil action cannot avoid the probate by showing the will to be forged. But, on consideration, the cases will appear to be consistent; for, in the civil suit, the evidence is offered for the purpose of showing that the party who obtained probate *did not thereby become executor,* which character the spiritual court has adjudged him to possess; but, in the criminal case, the party offering the evidence admits the probate to be valid till repealed, admits the defendant to have thereby become executor, but merely seeks to show what means he used in order to become so; which is no more than if he sought to prove that in the affidavit in which the prisoner verified the scripts he had committed perjury. On the other hand, in *R.* v. *Grundon,* Cowp. 315, a sentence of expulsion from a college was held conclusive in answer to an indictment for an assault on the express ground that it resembled a sentence of the spiritual court.

In *R.* v. *Vincent,* 1 Str. 481, indeed, the doctrine of the conclusiveness of the sentence was carried to a greater extent, and it seems to be impossible to support that case consistently with *R.* v. *Buttery,* and *R.* v. *Macnamara,* R. & R. C. C. 342; the latter decisions are those which must be now regarded law, being not only later in date, but the decisions of nine judges; whereas *R.* v. *Vincent* was decided by C. J. *King* alone.

With regard to *Courts of Admiralty,* the rule with regard to their sentences is the same as that regarding the sentences of spiritual courts where their proceeding is *in rem;*—for instance, when a vessel is condemned *as prize,* it seems never to have been disputed that the sentence is conclusive upon all the world. See the notes to *Le Caux* v. *Eden,* Dougl. 614, in which is set out the elaborate judgment in *Lindo* v. *Rodney,* containing a learned inquiry into the nature of the *Prize Court of Admiralty,* and the distinction between it and the *Instance Court.* The question as to the conclusiveness of the sentence of a prize court has usually arisen in cases turning upon the effect of foreign sentences, several of which will be presently enumerated.

The *sentence of a college visitor* depriving or expelling is conclusive; and it is apprehended is so against all the world, since the visitor's proceeding is *in rem,* and he pronounces operatively upon the *status* of the party deprived; see *Phillips* v. *Bury,* Skinn. 417. Lord *Raym.* 5, which was decided by three judges, contrary to the opinion of Lord *Holt,* which opinion was, however, afterwards upheld on error. His lordship's argument is fully given in 2 T. R. 346, in which he assimilates the case to that of a sentence of deprivation by the Ecclesiastical Court, and cites numerous authorities to show that that has always been conclusive. In *Phillips* v. *Bury* the sentence of deprivation passed upon the old rector was held conclusive in an ejectment by the new rector. In *R.* v. *Grundon,* Cowp. 315, the same point was decided upon an indictment for assaulting a fellow-commoner of Queen's (who had been expelled) and turning him out of the college garden.

On the same principle the sentence of a *court martial* seems to be conclusive. See *Rex* v. *Suddis,* 1 East. 306; for this court, to use the words of Lord *Loughborough,* in *Grant* v. *Gould,* 2 H. Bl. 100, "being established in this country by positive law, the proceedings of it must depend upon the same rules with all other courts which are instituted and have particular powers given to them." See *In re John Walter Poe,* 5 B. & Adol. 681.

Sentence of deprivation by a visitor appears to differ from the other cases above touched upon in this respect, viz., that it is the sentence of a tribunal which has in many instances been created by a private individual. This does not, however, seem to alter the principle; for, though no private individual can create a court whose sentence shall have operation on the persons or properties of others, yet there is no reason why he should not create one having operation on his own;

unless, indeed, he introduce some term inconsistent with public policy.

Thus, on the same ground on which a visitor's sentence is supported, stands the case of the trustees of a school dismissing the schoolmaster for misconduct. *Doe* v. *Haddon*, 3 Dougl. 310: and the ordinary case of an arbitrator, whose *forum* is a domestic one, constituted by the parties themselves who are bound by its award.

It has never, that I am aware of, been decided that, where a decree in Chancery, a sentence of the Ecclesiastical Court, or any other matter *quasi of record* is conclusive, any necessity exists of pleading it in order that it may be held so. This furnishes another argument against the reasoning on which *Goddard's* case and *Vooght* v. *Winch* are thought by some to have proceeded; for surely the obligation of the jury to find a true verdict is equally great, whether the matter offered as conclusive be a decree or a judgment. The rules which now regulate pleadings will probably compel parties to place them on the record oftener than heretofore.

The above observations have been confined to the judgments of our own tribunals; but, before quitting this part of the subject, it seems right to say a few words upon the effect of *foreign* ones.

With regard to *foreign judgments*, (and colonial judgments are included within these terms), it is even now not quite settled to what precise extent they bind in this country. "Great doubts," to use the expressions of the L. C. J. *Tindal*, "have formerly existed, and some degree of doubt still exists, whether a judgment so recovered is conclusive between the parties, or whether the matter may be opened and agitated in this country;" 5 Bingh. N. C. 221. They certainly do not occasion a *merger* of the original ground of action, *Smith* v. *Nicolls*, 5 Bingh. N. C. 208; *Hall* v. *Odber*, 11 East. 124. And, when it becomes necessary to enforce them in this country, the plaintiff has his option either to resort to the original ground of action, or bring an *assumpsit* on the judgment recovered; *per Tindal*, L. C. J., *ibid.* It may possibly be, that, if the plaintiff should adopt the former part of this alternative and sue on the original ground of action, it would be open to the defendant to controvert that ground of action notwithstanding the production of the foreign judgment, on the same principle on which it is held that where there is an opportunity of placing the judgment of one of our own superior courts on the record, and it is not placed there, it will not be conclusive. *Vooght* v. *Winch*, 2 B. & A. 162; *Doe* v. *Huddart*, 2 C. M. & Rosc. 316. That it will, however, operate in such a case as at least *prima facie* evidence of the plaintiff's right seems clear both upon principle and authority. See *per Eyre*, C. J., *Phillips* v. *Hunter*, 2 H. Bl. 410; and see *Sinclair* v. *Fraser*, Dougl. 5 no., and *Hall* v. *Odber*, 11 East. 124.

But next, which is by far the most common case, let us suppose the action to be brought upon the foreign judgment, —the question arises, would it be competent to the defendant, admitting its existence, to controvert it to any, and if to any, to what extent? This question formerly arose upon a plea of *non-assumpsit*, upon the trial of which, the judgment being offered in evidence was asserted by one side and denied by the other to be conclusive. There may be now some doubt whether, in such an action, circumstances impeaching it ought to be pleaded specially, or given in evidence under the plea of *non-assumpsit* as tending to rebut the implication of a promise arising from the existence of the judgment stated in the declaration. However this may be, there are some points clear upon the question of conclusiveness. First, it is clear that, if the judgment appear *on the face of the proceedings* to be founded on a mistaken notion of the English law, *Novelli* v. *Rossi*, 2 B. & Adol. 757, or of the law of nations, *Pollard* v. *Bell*, 8 T. R. 444; *Bird* v. *Appleton*, ibid 562; *Baring* v. *Clagett*, 3 B. & P. 215; *Bolton* v. *Gladstone*, 2 Taunt. 85; or to offend common reason and justice, *Buchanan* v. *Rucker*, 3 Camp. 63, 9 East. 192, S. C., and see *Cavan* v. *Stewart*, 1 Stark. 524, *Frankland* v. *M'Gusty*, 1 Knapp. 274; or even to be grossly defective, *Obicini* v. *Bligh*, 8 Bing. 351; it would not be conclusive either in a declaration or a plea. It will, probably, also,

be thought not too much to say, that our courts would allow it to be impeached by extrinsic evidence, offered for the purpose of showing that the court which pronounced it had no jurisdiction, see *Havelock* v. *Rockwood*, 8 T. R. 268; or that it was obtained by fraud, for that, to use the language of the L. C. J., is an extrinsic collateral act, which vitiates the most solemn proceedings even of our own courts; or by means contrary to the established principles of justice, as, for instance, without summoning or obtaining the appearance of the party defendant; for such an objection, if apparent on the proceedings, would be fatal; and it would probably be thought too great a confidence to repose in the officers of a foreign court, if we were to assume the impossibility of their stating the observance of such forms in cases where they were not actually observed. Indeed, in this country, a party may, as we know, obtain a judgment against another behind his back, if he will abuse the forms of the superior court and deceive its officers. To be sure, if he were to attempt to enforce such a judgment, the defendant would have a speedy remedy by applying to have it set aside and the offender punished by attachment. Where it is the judgment of a foreign court, however, he *may* have no such means of redress, and is almost certain to have no opportunity given him to adopt them. See *Guinness* v. *Carroll*, 1 B. & Adol. 463, where the question was discussed whether it could be shown in answer to an Irish judgment, that it was entered up by the wrong person. However this may be, it appears from *Malony* v. *Gibbons*, 2 Campb. 502, that the statement, upon the face of the proceedings, that the proper formalities have been observed, is *primâ facie* evidence at least that they were so—that was an action on a Jamaica judgment. After the declaration was the following entry:—"And the said J. Gibbons, by J. Ferrier, his attorney, comes and defends, &c. and says nothing in bar or preclusion of the said action," &c. It was objected, that the plaintiff ought to prove that Ferrier was properly constituted the defendant's attorney. Lord *Ellenborough*, however, said, "I will look to these foreign judgments with great jealousy; but I must give them credit for the facts which they specifically allege, and I must presume in the present case that the court saw Ferrier properly constituted attorney for the defendant."

It is not intended to enter here into any review of the cases in which the question has been, whether the defendant was so far in the nature of a resident within the colony, or jurisdiction of the foreign court as would satisfy the principle stated in *Buchanan* v. *Rucker*, and *Becquet* v. *M'Carthy*, 2 B. & Ad. 951,—the object of this note being to inquire, not into the essentials of a valid judgment, but into the question, how far forth the judgment stating those essentials, be they what they may, is evidence of their existence.

Assuming, then, that a foreign judgment is impeachable for a defect apparent on the face of it—assuming, also, that it is impeachable by extrinsic evidence adduced to show that the court which pronounced it had no jurisdiction, or that it was obtained by fraud, or by a neglect of those precautions which the universal principles of justice render necessary;—the question which arises next is, *whether it can be impeached upon the merits?* Now, upon one side it is said, that the tribunals of this country are not *bound* to enforce the judgments of a foreign court, that when they do so, it is *de gratiâ*, and from a wish to extend the limits of justice—*ampliare justitiam*. But that it would be to amplify injustice, not justice, were they to enforce a sentence, which ought never to have been pronounced because against the party with whom right was. On the other side, it is answered with great force, that invariable experience shows, that facts can never be inquired into so well as on the spot where they arose, and laws never administered so satisfactorily as in the tribunals of the country governed by them; that, if our courts were to allow matters judicially decided upon to be again opened at any distance of time or place, the consequence would be, in ninety-nine cases out of a hundred, that they would be deceived by the concoction of testimony, or by the abstraction of it, or by the want of it, and

that injustice and mistakes, instead of being amended, would be generated.

Now on both sides of this question there is a good deal of authority. On the former side is the opinion of Lord *Mansfield* in *Walker* v. *Witter*, Dougl. 1; of *Eyre*, C. B., in *Phillips* v. *Hunter*, 2 H. Bl. 410; and of Mr. Justice *Buller* in *Galbraith* v. *Neville*, Dougl. 5 *note*, where his lordship cited a resolution of the House of Lords in *Sinclair* v. *Fraser*, 20 Howell's Sta. Tr. 468, to the effect, that "the judgment of the supreme court of Jamaica ought to be received as evidence *primâ facie* of the debt, and that it lies upon the defendant *to impeach the justice thereof*, or to show the same to have been irregularly or unduly obtained." It will, however, be observed, that in none of the above cases was it necessary to decide the question of conclusiveness. In *Sinclair* v. *Fraser*, the ground of appeal to the lords was, not that the Scotch court had held the Jamaica judgment conclusive, but that it had refused to receive it even as *primâ facie* evidence of the existence of the debt. *Arnott* v. *Redfern*, 3 Bingh. 353, sometimes cited as an authority on this side of the question, is, in reality, none, for there the only decision was, as in *Sinclair* v. *Fraser*, on the authority of which it proceeded, that the Scotch judgment was at all events *primâ facie* evidence. On the contrary, the L. C. J. *Best* expressly says, "We think that it is not necessary to consider whether the judgment pronounced by the Scotch court can be impeached here."

On the other side, is the opinion of Lord *Hardwicke* in *Boucher* v. *Lawson*, Cas. Temp. Hardwicke 89; of Lord *Kenyon* in *Galbraith* v. *Neville*, Dougl. 5, note; and Lord *Ellenborough* in *Turleton* v. *Tarleton*, 4 M. & S. 21. In that case the plaintiff, the defendant, and D. B. had been partners, and the defendant and D. B. had covenanted to indemnify the plaintiff against the debts of the late firm. In an action on that covenant, in order to prove the damnification, a copy of a foreign judgment was put in, in consequence of which the plaintiff's property had been seized. Evidence was offered to impeach the correctness of this judgment, which being disallowed, the defendant moved for a new trial.

The rule was refused. Lord *Ellenborough* said: "I thought I did not sit at *Nisi Prius* to try a writ of error in this case upon the proceedings of the court abroad. The defendant had notice of the proceedings, and should have appeared and made his defence." It must, however, be observed, that Mr. J. *Bayley* took a distinction which would suffice to prevent this case from bearing greatly on the question now under discussion. His lordship said, "*As between the parties to the suit, the justice of it might again be litigated*; but, as against a stranger, it could not." This *dictum*, so far as it bears upon the point, seems to be in favour of Lord *Mansfield's* view.

In *Becquet* v. *M'Carthy*, 2 B. & Ad. 95, evidence was received at *nisi prius* to contradict the facts on which the colonial judgment proceeded. It was observed, during the argument in the following term, that it was not clear that that evidence was admissible. And Mr. J. *Parke* observed, that "the Vice-Chancellor had held in *Martin* v. *Nicolls*, 3 Sim. 458, that the grounds of a foreign judgment cannot be reviewed in the courts of this country; and that a bill for a discovery and a commission to examine witnesses in *Antigua* in aid of the plaintiff's defence to an action brought on the judgment in this country was demurrable." This case is, perhaps, the authority most directly bearing on the question. There is an older case of *Burrows* v. *Jemimo*, Str. 733, where an acceptor, whose acceptance had been vacated by a decree at *Leghorn*, being afterwards sued here, obtained an injunction, which would, however, I presume, hardly be granted in such a case at this day. In *Smith* v. *Nicolls*, 5 Bingh. N. C. 221, the Lord C. J. *Tindal*, in the passage above cited, treats the point as still undecided. "Great doubts," his lordship says, "have formerly existed, and some degree of doubt still exists, whether a judgment so recovered is conclusive between the parties, or whether the matter may be opened and agitated in this country."

A mere note like the present affords no room for entering further into this difficult

and interesting question. The doubt which surrounds it has probably been a good deal increased by arguments in which it has been assumed that no distinction exists between the claim to question a foreign judgment on the merits, and to question it upon the ground of fraud, or want of jurisdiction, or that it was unduly obtained. See for the American law upon this subject, Story, Conf. L. c. 15; Kent's Comm. Lec. 27.

But whatever difficulty there may exist in solving the above point, thus far at least is settled,—that a foreign judgment cannot be conclusive here, which is not shown to be so in the country where it was pronounced. That was decided in *Plummer* v. *Woodburne*, 4 B. & C. 625, where the foreign judgment was pleaded, and the plea held bad, on the ground that its conclusiveness in the country where it was given was not alleged on the record. This decision is recognised in *Smith* v. *Nicolls*, 5 Bingh. N. C. 222. *A fortiori*, a foreign judgment cannot be held conclusive here, where the proceedings are so defectively set out that the point which it is sought to establish by it, does not clearly appear to be decided. *Obicini* v. *Bligh*, 8 Bingh. 351; *Sadler* v. *Robins*, 1 Camp. 253.

There are, however, some cases in which the effect in evidence of the judgment of a foreign court is regulated by different considerations from the above,—I mean cases in which the judgment is *in rem*, or concerns something in its nature *local*.

The commonest instance of the effect of the judgment of a foreign court of competent jurisdiction *in rem* is afforded by the sentences of Courts of Admiralty on questions of *prize*. "That these sentences are admissible and conclusive evidence of the fact they decide, it seems not safe now to question," were the expressions of Le Blanc, J., in *Lothian* v. *Henderson*, 3 B. & P. 517. And this opinion is amply borne out by prior and subsequent authorities. See *Kindersley* v. *Chase*, Park Ins. 490; *Bolton* v. *Gladstone*, 5 East, 160; *Baring* v. *Clagett*, 3 B. & P. 214; *Christie* v. *Secretan*, 8 T. R. 196. Such a sentence, being *in rem*, binds the rights of third persons. Indeed, the question as to the effect of such proceedings has usually arisen between persons not parties to them; for, in most of these cases, the question has been between the underwriter and the assured, and the point in issue, whether the latter's warranty of neutrality has been complied with; to prove the non-compliance with the warranty, the sentence of a foreign court condemning the vessel as enemy's property, has been produced, and has been admitted to be conclusive. In *Kindersley* v. *Chase*, Park. 490, the Master of the Rolls said: "It has been clearly settled, from the time of Lord Hale down to the present period, that the sentence of condemnation in a Court of Admiralty, when it proceeds on the ground of enemies' property, is conclusive that the property belongs to enemies, *and, not only for the immediate purpose of such sentence, but is binding on all courts and against all persons.* The sentence of a Court of Admiralty proceeding *in rem* must bind all parties,—must bind all the world." "Since the judgment of the House of Lords in *Lothian* v. *Henderson*," said Lord Ellenborough, delivering judgment in *Bolton* v. *Gladstone*, 5 East, 160, "it may be assumed, as the settled doctrine of a court of English law, that all sentences of courts of competent jurisdiction to decide questions of prize are to be received here as conclusive evidence in actions upon policies of insurance upon every subject immediately and properly within the jurisdiction of such foreign courts, and upon which they have professed to decide judicially." This doctrine being, therefore, well established, the question in later cases has become, not whether the judgment of the foreign court be in its nature conclusive, but, whether it be a judgment upon the point in controversy: since it is obvious that it would be absurd to treat it as conclusive upon points which it did not involve, or which, although they may have been involved in it, yet, from the manner in which it is framed, do not appear to have been so. This view was acted on by the King's Bench in *Bernardi* v. *Motteux*, 2 Dougl. 575, which is thus commented upon by Mr. J. Lawrence in *Lothian* v. *Henderson*, 3 B. & P. 526.—"The case of *Bernardi* v. *Motteux*," said his lordship, "is the original authority

upon which all the other cases upon this subject have been founded. In that case the determination of a Court of Admiralty in France was held not conclusive against a warranty of neutrality. And there, Lord Mansfield stated the difficulty to be, the not being able to collect the grounds on which the French Court of Admiralty went, whether that of enemies' property, or that of papers being thrown overboard contrary to an *arrêt* of that country ; and thinking, that enough did not appear on the sentence to ascertain precisely upon what it was founded, and that the French Admiralty might have proceeded on the ground of the papers being thrown overboard, determined in favour of the plaintiff, on the ambiguity of the sentence."

In a subsequent case, *Saloucci* v. *Woodmass*, Park 362, Lord Mansfield laid it down as a rule, that, where no other ground appeared, the condemnation of a ship *as prize* must be taken to have proceeded on the ground of enemies' property, and distinguished that case from *Bernardi* v. *Motteux*, as there another ground, namely the *arrêt*, appeared, on which the condemnation might have proceeded.

Consonant with *Bernardi* v. *Motteux* is *Pollard* v. *Bell*, 8 T. R. 435, where the subject will be found largely discussed, *Bird* v. *Appleton*, ibid. 562 ; *Horneyer* v. *Lushington*, 1 Camp. 89 ; *Calvert* v. *Bovil*, 7 T. R. 325 ; *Fisher* v. *Ogle*, 1 Camp. 417 ; and *Dalgliesh* v. *Hodson*, 7 Bing. 504. In *Baring* v. *Clagett*, 3 B. & P. 215, Lord Alvanley thus gives the history of the decisions upon this part of the subject. " It was once," says his lordship, " doubted by Lord Kenyon in the case of *De Souza* v. *Ewer*, whether the mere fact of condemnation *as prize* was not, of itself, conclusive against the warranty of neutrality, though special grounds of condemnation appeared in the sentence not warranted by the law of nations, for it was considered that a contrary doctrine would impute bad faith to the tribunal by whom the condemnation was pronounced : and, unless such special grounds appear, the sentence is undoubtedly conclusive. Accordingly, in *Saloucci* v. *Woodmass*, where a ship warranted neutral was condemned *as good and lawful prize*, that single allegation in the sentence was deemed sufficient to negative the neutrality of the ship, because, *as no special ground of condemnation appeared*, the court held themselves bound to suppose that it proceeded on the just and lawful ground of the ship being enemies' property. But, in *Bernardi* v. *Motteux*, the Court considered the sentence conclusive as to every thing it professed to decide, yet held themselves at liberty to examine whether the ground on which the sentence proceeded actually falsified the warranty contained in the policy. Then follows a series of decisions in which the courts have determined, that, if the condemnation does not plainly proceed upon the ground of enemies' property, or that of the ship not having complied with subsisting treaties between her own country and that of the capturing power, *but* on the ground of regulations arbitrarily imposed by the latter, to which neither the government of the captured ship nor the other powers of Europe have been made parties, such a condemnation shall not be admitted as conclusive against a warranty of neutrality." And his lordship cited *Mayne* v. *Walter*, Park 363 ; *Pollard* v. *Bell*, 8 T. R. 434 ; *Bird* v. *Appleton*, 8 T. R. 562 ; and *Price* v. *Bell*, 1 East 363.

Upon the whole, the rule appears to be, that the sentence of a foreign court of admiralty of competent jurisdiction, pronounced *in rem*, is conclusive, against all the world, as to the existence of the ground on which the court professes to decide.

2. It would seem from *Saloucci* v. *Woodmass*, that such a court shall *perhaps*, where it states no ground of decision, be presumed to have decided on the ground which would warrant its decision in the terms in which it is pronounced ; and that, therefore, where a vessel is condemned *as prize*, the court would be presumed to have condemned it on the proper ground, namely, an infraction of neutrality, or what amounts to the same thing, a breach of treaty. But,

3dly. That this presumption ends, where it appears doubtful upon the face of the sentence itself, whether the ship was not condemned upon some other ground ; such, for instance, as the infraction of a mere local ordinance. In such a case, it

is apparent, that the words *as lawful prize*, even if used, may be, and probably are, a mere misapplication of terms, so far as they may lead to the inference that a breach of neutrality has been committed.

It must, however, be confessed, that, notwithstanding Lord Mansfield's decision in *Saloucci* v. *Woodmass*, and Lord Alvanley's seeming approval of it in *Baring* v. *Clagett*, it appears probable that the second of the above propositions may hereafter be successfully drawn into question; for certainly it seems scarcely compatible with some of the expressions of the judges in more recent cases. Thus, in *Dalgliesh* v. *Hodson*, Tindal, C. J., says,—"The general law upon the subject is well known, that the sentence of a foreign court of admiralty of competent jurisdiction is binding upon all parties, and in all countries, as to the fact on which such condemnation proceeded, where such fact appears on the face of the sentence free from doubt and ambiguity. But it is at the same time as well established, that, in order to conclude the parties from contesting the ground of condemnation in an English court of law, such ground must appear clearly on the face of the sentence. *It must not be collected from inference only.*" Now, certainly, in a case like *Saloucci* v. *Woodmass*, the ground of decision not being expressed, must, if collected at all, be collected *by inference*. Indeed, it seems almost impossible to reconcile the decision in *Saloucci* v. *Woodmass*, with that of *Fisher* v. *Ogle*, 1 Campb. 418; and if a choice is to be made between the two decisions, the feeling of the courts seems certainly to be at present against extending the effect of foreign sentences.

In *Fisher* v. *Ogle*, to falsify a representation that the ship was American, a sentence of the Admiralty Court of Martinique was produced, this stated, "that it resulted evidently from the papers on board, that the expedition of the said ship Juno, her cargo, and her operations on the coast of Africa, were for account of the Brothers Geddes, merchants of London, who had, to mask the English property of this outfit, borrowed the American flag and passport of the said ship Juno, and taken for their agent and partner in the expedition Captain Fisher furnished with a certificate of citizen of the United States." The sentence then went on to declare *as good and valid prize* the slave ship Juno, and to confiscate the ship and cargo to the profit of the captors.

Lord Ellenborough said,—"We show a sufficient respect to French sentences, if we attach credit in our courts to what they distinctly say. It is often painful to go this length, considering the piratical way in which they proceed. But this sentence does not say the ship was *not American*, and it is not to be considered evidence of what it does not specifically affirm. I dare say such sentences will be positive enough in future, since those who frame them are disposed to consider every thing as good prize against all mankind. When they do speak out, I will give them the same effect here which they receive in other places. But there is no proof that, in the present case, the property was not American, though such an inference might be drawn from certain indirect statements in the sentence now presented to us."

A motion for a new trial was refused, and his lordship said—"It is by *an overstrained comity* that these sentences are received as conclusive evidence of facts which they positively aver, and on which they specifically profess to be founded."

This case was decided in the year 1808. On a subsequent occasion, his lordship expressed similar sentiments, saying:—"I am by no means disposed to extend the comity which has been shown to these sentences of foreign admiralty courts. I shall die, like Lord Thurlow, in the belief that they never ought to have been admitted. The doctrine in their favour rests on an authority in Shower, which does not fully support it, and the practice of receiving them often leads, in its consequences, to the greatest injustice."

It is plain that, unless the foreign court be one of competent jurisdiction, its sentence, far from being conclusive, can have no effect at all. Thus, it is a settled point of international law that the prize court of one belligerent cannot sit in the dominions of a neutral power. "Its doing so," as Sir William Scott observed in the

celebrated case of the *Flad Oyen*, 8 T. R. 270, note, "is a licentious attempt to exercise the rights of war within the bosom of a neutral country." Accordingly, to the sentence of such a tribunal, our courts attribute no credit or authority whatever. *Havelock* v. *Rockwood*, 8 T. R. 276; *Donaldson* v. *Thomson*, 1 Camp. 429; which cases overrule *Smith* v. *Surridge*, 4 Esp. 26. See the distinction taken in *Oddy* v. *Bovil*, 7 T. R. 523, between a prize court held in the dominions of a neutral, and one held in those of a co-belligerent.

Another instance of the effect of the sentence of a foreign court *in rem* is afforded by the decree of such a court establishing or nullifying a marriage. Such a sentence would, it is apprehended, be conclusive, *if pronounced on a marriage within the jurisdiction of such court to adjudicate upon.* Lord Hardwicke's observations in *Roach* v. *Garvan*, 1 Ves. sen. 159, are often cited on this subject. "As to the fact of the marriage, (says his lordship,) it has been argued to be valid from being established by the sentence of a court in France *having proper jurisdiction.* And it is true, *if that is so, it is conclusive*, whether in a foreign court or not, from the law of nations; otherwise, the rights of mankind would be very precarious and uncertain." In *Boucher* v. *Lawson*, Cas. Temp. Hardwicke 9, the C. Justice mentions, that "in the time of Car. 2, a suit was brought on a contract of marriage, and the sentence of the ecclesiastical court of Turin was given in evidence, and allowed to be conclusive." This appears to be the same case as *Expte Cottington*, extracted in 2 Swanston 326, *in notis* from Lord Nottingham's MSS., whence it appears, that on June 10, 30 Car. 2, (1678,) Mr. Cottington presented a petition to the Lords of Parliament, "praying to be relieved against a sentence given by the delegates in a matrimonial cause, wherein they had adjudged that *Signora Angelina Margarita Gallina*, a very lewd woman, was the petitioner's lawful wife." The ground of the petition was, that the *Signora* had another husband living at Turin; and that, though she had been divorced from that other husband by the sentence of the Archbishop of Turin, yet that the sentence of divorce was invalid. Lord Nottingham, however, stated his opinion to be clear that the sentence was not examinable in this country, and that the court of delegates had acted right *in holding it conclusive.*

It appears certain (it may be remarked) that this divorce was one between two foreigners *married abroad;* and it has been laid down by high authority that a foreign court has no jurisdiction to annul a marriage solemnised in this country, on grounds upon which it could not be declared void by the courts here.

"Undoubtedly," says Lord Stowell, in *Sinclair* v. *Sinclair*, 1 Hagg. C. C. Ca. 297, "a sentence of separation in a proper court for adultery would be entitled to credit and attention in this court; but I think the conclusion is carried too far, when it is said, that a sentence of nullity of marriage is necessarily and universally binding in other countries. Adultery and its proofs are nearly the same in all countries; the validity of marriage, however, must depend, in a great degree, on the local regulations of the country where it is celebrated. A sentence of nullity of marriage, therefore, in the country where it was solemnised, would carry with it great authority in this country, but I am not prepared to say that the judgment of a third country on the validity of a marriage *not within its territories, nor had between subjects of that country*, would be universally binding. For instance, the marriage alleged by the husband is a French marriage. A French judgment on that marriage would have been of considerable weight; but it does not follow that the judgment of a court at Brussels on a marriage in France would have the same authority, much less on a marriage celebrated here in England." In *Macarthy* v. *De Caix*, 3 Hagg. 642, note, Mr. Tuke having married in England, was divorced in Denmark. The wife came to England and died; the husband took out letters of administration in England to his wife, and, upon his death, there was a suit in Chancery between his executors and the wife's next of kin, relative to the property. Brougham, L. C., decreed in favour of the executors, observing that the English marriage could not be annulled by the Danish law. No

question of domicil seems to have been raised either in this case, or, as far as we can judge from the report, on which, however, Dr. Lushington has animadverted as extremely meagre, in *R.* v. *Lolley*, R. & R. 237, in which Lolley was convicted of bigamy, for having married Helen Hunter during the life of Anne Sevaia, to whom he had been previously married, but from whom he had been divorced in Scotland. The point was reserved for the opinion of the Twelve Judges, who are stated to have been unanimously of opinion, "that no sentence or act of any foreign country or state could dissolve an English marriage *a vinculo matrimonii, for ground on which it was not liable to be dissolved a vinculo matrimonii* in England."

However, though the rule is thus broadly stated, Dr. Lushington in his elaborate judgment in *Conway, otherwise Beaseley*, v. *Beaseley*, has pointed out a question, on which, though falling within the generality of its terms, he does not look upon it as conclusive. That case itself, which is reported in 3 Hagg. Ecc.R. 639, was decided upon the authority of Lolley's, from which it was impossible to distinguish it. But Dr. Lushington said, that, in his opinion, the question of domicil *might*, if it arose, form an important and distinguishing feature,— "A case," said he, "in which all the parties are domiciled in England, and resort is had to Scotland, (with which neither of them has any connexion,) for no other purpose than to obtain a divorce *a vinculo*, may possibly be decided on principles which would not altogether apply to a case differently circumstanced, as where, prior to the cause arising on account of which a divorce was sought, the parties had been *bona fide* domiciled in Scotland. Unless I am satisfied that every view of this question had been taken, the court cannot, from the case referred to (Lolley's) assume it to have been established, as an universal rule, that a marriage had in England and originally valid by the law of England, cannot, under any possible circumstances, be dissolved by the decree of a foreign court."

In *Tovey* v. *Lindsay*, 1 Dow. 117 ; *Same* v. *Same*, ibid. 131 ; and which was argued on a Scotch appeal subsequently to Lolley's case, the question was most elaborately discussed ; and not merely with reference to the *place of contract*, and to the domicil at the time of the divorce, but with regard, also, to the *forum originis* ; the question being raised, whether the Scotch courts, founding their jurisdiction on the *original domicil* of the husband, could divorce *a vinculo matrimonii*, though the marriage was in England, and the actual domicil of both parties was in England. The remarks of Lords Eldon and Redesdale will be found very instructive. Their Lordships' impression seems to have been, that the divorce was bad ; but the case was remitted for further consideration to the Court in Scotland.

The question as to the precise power of a foreign court over a marriage solemnised between strangers, or in a different country, has been much discussed by foreign jurists. It is obvious, at first sight, that it divides itself into a number of distinct cases, each susceptible of different considerations ; for, 1st, the marriage sought to be avoided by the sentence of the foreign court, may be, between two strangers, and solemnised in a strange country ; or, 2dly, between two natives of the country where the court sits, but solemnised in a strange country ; or, 3dly, between two strangers, but solemnised in the country where the court sits ; and the cases 2dly and 3dly, above put, may be again subdivided ; for the marriage of two persons solemnised in a country to which they are strangers, may be contracted, either according to the forms in use in that country, or else according to a form which some municipal law of their own country has directed shall be sufficient abroad. All the above cases will be again varied by supposing one of the contracting parties to be a native, and the other a stranger. A further distinction (which we have seen is treated as important) will arise where the parties, or either party, have become, or were originally, domiciled in the country in the courts of which the validity of their marriage is drawn into question. It would obviously be incompatible with the plan of this note to involve the reader in such controversies. I will, therefore, simply remark, that, whether the judgment of a foreign

court be, or be not, admissible, in some of the above cases, to prove the *dissolution* of a marriage, still, it is apprehended that the sentence of a foreign court affirming the validity of a marriage would always be admissible here, inasmuch as marriage is a fact proveable by reputation; (see *Scrimpshire* v. *Scrimpshire*, 2 Hagg. 340, 397; *Sinclair* v. *Sinclair*, 1 Hagg. 297). And possibly, on this ground, it might even be made a question, whether the void sentence of a foreign court, purporting to dissolve an English marriage, ought not to be received as good *primâ facie* evidence of the existence of the very marriage sought to be dissolved by it. The reader, if desirous of pursuing the subject, will find it discussed on general principles, and at considerable length, in *Story's Conflict of Laws*. For the present I will but transcribe the observation of Lord Redesdale in *Tovey* v. *Lindsay*, 1 Dow. 140, viz.—"that if any one, from any quarter, might go and establish a domicil in Scotland, and by that means draw his wife to a Scotch forum, and proceed against her for an absolute dissolution of the marriage,—if this were to prevail, any person has it in his power to alter the nature of his most solemn engagements. The wife might say, *that such was not her contract;* and, if this were not held to be a sufficient answer, the court below might, on the same principle, judge all other contracts by their own law, as well as that of marriage. . . . . It could not be just that one party should be able, at his option, to dissolve a contract by a law different from that under which it was formed, and by which the other party understood it to be governed."

With regard to foreign judgments *upon matters in their nature local*,—such, for instance, as title to landed property. They, it is apprehended, must be treated as conclusive here, on account of the impossibility of their being effectually questioned. It seems obvious, however, that their effect here must not be greater than would be attributed to them abroad. And, therefore, if the right to land in France were to come incidentally in question before the courts in this country, a judgment in the courts of France between A. and B. could not, it is apprehended, be evidence here between A. and C., unless it were first shown that such a judgment would in France have the effect of a judgment *in rem*, and bind third parties. *Plummer* v. *Woodbourne*, 4 B. & C. 625, and *Smith* v. *Nicolls*, 5 Bing. N. C. 222, seem sufficiently to prove this proposition.

Next, as to *Estoppels by Deed*.

"No man," says Lord Mansfield, in *Goodtitle* v. *Bailey*, Cowp. 601, "shall be allowed to dispute his own solemn deed." Numerous instances of the conclusive effect of a deed are to be found in the books. See *Fairtitle* v. *Gilbert*, 2 T. R. 171, (and see the distinction mentioned there between a trustee for the public, and other persons, as to which see also, *Doe* d. *Baggaley* v. *Hares*, 4 B. & Ad. 437). See also, on the general principle, *Right* v. *Proctor*, 4 Burr. 2208; *Bonner* v. *Wilkinson*, 2 B. & A. 682; *Johnson* v. *Mason*, 1 Esp. 89. And, not only is the deed conclusive on the party executing it, as to the very point intended to be effected by the instrument; (See *Rowntree* v. *Jacob*, 2 Taunt. 141; *Harding* v. *Ambler*, 3 M. & W. 279; Co. Litt. 352 a,) but also as to facts recited in it. (See *Nash* v. *Turner*, 1 Esp. 217; *Rees* d. *Chamberlain* v. *Lloyd*, Wightwick, 123; *Jones* v. *Williams*, 2 Stark. 52). Thus, in *Bowman* v. *Taylor*, 2 Ad. & Ell. 278, the deed recited, that the plaintiff had invented certain improvements, for which he had obtained a patent; and the defendant, in consideration of a licence to use it, entered into certain covenants, for the breach of which he was sued, it was held that he could not traverse the invention of the plaintiff, and that a plea to that effect was bad upon demurrer. The passage from Co. Litt. 352 b, was cited to the effect that "a recital doth not conclude because it is no direct affirmation." However, the court were unanimous in giving effect to the estoppel. "The law of estoppel," said Mr. J. Taunton, "is not so unjust or absurd as it has been too much the custom to represent. The principle is, that where a man has entered into a solemn engagement by and under his hand and seal, as to certain facts, he shall not be permitted to deny any matter which he has so asserted. The question here is, whether this be a matter so as-

serted by the defendant under his hand and seal, that he shall not be permitted to deny it in pleading. It is said, that the allegation in the deed is made by way of recital, but I do not see that a statement such as this is the less positive, because it is introduced by a "Whereas."

To the same effect as *Bowman* v. *Taylor* is *Lainson* v. *Tremere*, 1 Ad. & Ell. 792. That was an action on a bond, the condition of which, being set out on oyer, recited an indenture of demise at a rent of 170*l.*, for payment of which the bond was conditioned. The plea set out an indenture, which it averred to be the same as that mentioned in the condition, and in which the rent was 140*l.*, due payment of which was averred. Replication, non-payment of the 170*l.* rent; and demurrer. The court held that the defendant was estopped from saying that the rent reserved was different from that recited, and gave judgment for the plaintiff, (see *Harding* v. *Ambler*, 3 M. & W. 279). To the same effect as *Bowman* v. *Taylor* and *Lainson* v. *Tremere* is *Hill* v. *Manchester* and *Salford Waterworks Company*, 2 B. & Adol. 244.

In the above three cases of *Lainson* v. *Tremere*, *Hill* v. *M.* & *S. W. W. Co.*, and *Bowman* v. *Taylor*, the prior authorities will be found collected.

A distinction has been frequently noticed between the effect of a *general* and of a *particular* recital. "In *Rolle's Abridgment*, Estoppel, P. pl. 1 & 7, it is laid down, that "if the condition contain a *generality* to be done, the party shall not be estopped to say there was not any such thing. But, in all cases where the condition of a bond has reference to a *particular thing*, the obligor shall be estopped to say that there is no such thing. The same rule as to generalities and particularities is laid down in *Strowd* v. *Willis*, Cro. Eliz. 762, and *Shelly* v. *Wright*, Willes 9, and urged in argument in *Hosier* v. *Searle*, 2 B. & P. 299, and *Hill* v. *Manchester* and *Salford Waterworks Company*." *Per* Lord Denman delivering the judgment of the court in *Lainson* v. *Tremere*.

The ground of this distinction I apprehend to be the same as has been already laid down with reference to estoppels by matter of record, namely, that an *estoppel* must be *certain*. In *Doe* d. *Jeffreys* v. *Bucknell*, 2 B. & Adol. 278, a party had covenanted with a mortgagee that he was "legally or equitably" entitled, a subsequent mortgagee was held not to be estopped from setting up the legal estate, which the mortgagor had acquired after the first mortgage. "There is," said Lord Tenterden, delivering the judgment of the court, "a want of that *certainty of allegation* which is necessary to make it an estoppel." Lord Holt lays it down in *Salter* v. *Kidley*, 1 Show 59, that *general recital* is not an estoppel, *though recital of a particular fact is*." See Comyn's Di. Estoppel, A. 2, *Rainsford* v. *Smith*, Dyer 196 a, *note*.

With regard to the mode in which an estoppel by deed is to be used, it is apprehended that the rule is the same as that which, as is above contended, governs the user of an *estoppel* by the judgment of a *court of record*, viz. that the estoppel must be pleaded if there be an opportunity, otherwise, the party omitting to plead it waives the estoppel, and the jury must find the truth; *Bowman* v. *Rostron*, 2 Adol. & Ell. 295; *Wilson* v. *Butler*, 4 Bing, N. C. 748. It is, however, clear that, where the estoppel is apparent on the face of the record, advantage of it may be taken on demurrer. This, it will be seen, was done in *Bowman* v. *Taylor*, and *Hill* v. *Manchester* and *Salford Waterworks Company*. And a number of instances will be found in the instructive notes to *Veale* v. *Warner*, 2 Wms. Saund. 325 a, where the authorities on this point are collected.

This seems the best place in which to advert to a rule which, although general, is most frequently applied to cases of estoppel by deed, viz. *that there can be no estoppel where an interest passes*. Thus, though a lessee is estopped from showing that his lessor had no title to the premises demised, yet he may show that he was entitled to a particular estate which has expired. See *Doe* v. *Seaton*, 2 C. M. & Rosc. 728; and see the notes to *Walton* v. *Waterhouse*, 2 Wms. Saund. 418, in which this portion of the subject is so fully treated by the learned editors, that it would be a mere waste of time to recapitulate their observations.

Estoppel by matter in pais.

The instances given by Lord Coke of estoppels *in pais* are:—"By matter *in pais*, as by liverie, by entry, by acceptance of rent, by partition, and by acceptance of an estate," as in the case put by Littleton in secs. 666, 667.

The example given by Littleton of an estoppel by acceptance of an estate is the case of a feoffment without writing accompanying it; a case which could not arise at present, in consequence of the statute of Frauds. We have, however, numerous instances of this sort of estoppel; for no rule can be more clearly settled, than, that a man shall not be permitted, during his possession of premises, to dispute the title of the landlord under whom he entered. The case oftenest cited for this is perhaps *Doe* d. *Knight* v. *Lady Smythe*, 4 M. & S. 347. "It has," said *Dampier*, J., in that case, "been ruled often, that neither the tenant, nor any one claiming by him, can dispute the landlord's title. This, I believe, has been the rule for the last twenty-five years, and, I remember, was so laid down by *Buller*, J., upon the western circuit." Accordingly, in *Doe* d. *Bullen* v. *Mills*, 2 B. & Adol. 17, it was held, that, if a tenant consents to give up possession to a party claiming by a title adverse to his own landlord, that party is estopped, as the tenant would have been, from disputing the landlord's title. So a person who defends in ejectment as landlord is bound by an estoppel of this sort existing against the tenant in possession; *Doe* v. *Lady Smythe*, *ubi supra*; *Doe* v. *Mizem*, 2 Moo. & Rob. 56.

A great number of instances of this sort will be found collected in the note to *Veale* v. *Warner*, 1 Wms. Saund. 325; in addition to which, see *Doe* v. *Fuller*, 1 Tyrwh. & Gr. 17; *Parry* v. *House*, Holt 489; *Hall* v. *Butler*, 2 P. & Dav. 374; *Fleming* v. *Gooding*, 10 Bingh. 549, in which it is laid down, that, where premises are let by the agent of an unnamed landlord, as such, the tenant who has gone into possession is estopped from disputing the title of the unnamed landlord when disclosed. See also *Francis* v. *Doe*, 4 Mee. & Welsb. 331, where a firm taking a lease from one of the partners was held to be estopped. The principle of the rule includes even a licensee, who is prevented from disputing the title of the person who licensed him; *Doe* d. *Johnson* v. *Baytup*, 3 Ad. & Ell. 188. In that case, the defendant asked leave of the party possessed to get vegetables in the garden, and, having thus obtained an entrance, took possession of the house, claiming a title. It was held that she was estopped. "In the case," said Mr. J. Patteson, "of a person who has become tenant there is no doubt as to the law. *Doe* dem. *Knight* v. *Lady Smythe* shows that he must first give up possession to the party by whom he was let in, and then, if he, or any one claiming by him, has a title *aliunde*, that title may be tried by ejectment. . . . . The rule as to claiming title, which applies to the case of a tenant, extends also to that of a person coming in by permission as a mere lodger, or as a servant."

But though the tenant cannot dispute the landlord's title, he is permitted to show that it has expired, (see the authorities collected in the notes to *Walton* v. *Waterhouse*, 1 Wms. Saund. 418,) for, in that case, he does not *dispute* the title, but confesses and avoids it by matter *ex post facto*: thus in *Hopcraft* v. *Keys*, 9 Bingh. 613, Hopcraft was let into possession by Hawkins, upon the 12th of February, 1831, at a quarterly rent for a year certain. But Hawkins' own title was under Kent, and was defeasible upon the non-completion of certain matters which, not having been completed, Kent re-entered before any rent became payable from Hopcraft to Hawkins, and kept out Hopcraft for some weeks, but afterwards restored him to possession under a new agreement and at a different rent payable to himself. Hawkins afterwards distrained for the rent he had reserved, and, in an action of replevin, it was held that Hopcraft was not estopped from showing, under a plea of *non tenuit*, that his landlord had a defeasible title only, and that it had been defeated as above-mentioned. See *Doe* v. *Seaton*, 2 C. & M. Rose, 728.

As it is competent to the tenant to show when the title of the landlord expired, so he may dispute its validity at any time previous to his own tenancy, so

as to avoid an assurance made by the landlord before its commencement. *Doe* d. *Oliver* v. *Powell*, 1 Adol. & Ell. 531.

The *estoppel* by *payment* of rent is not so strong as that by acceptance of the tenancy: for a person who has paid rent is allowed to show that he did so in consequence of mistake or misrepresentation. *Fenner* v. *Duplock*, 2 Bingh. 10; *Rogers* v. *Pitcher*, 6 Taunt. 202. "The rule is clear," said *Dallas*, J., in that case, "that, generally, a tenant cannot dispute his landlord's title; but here it comes to this question, whether, after a person has been in possession under another lessor, if he has been persuaded to attorn under circumstances which do not warrant it, it may not be open to him to prove that the rent was paid without sufficient ground: and I think it is. In *Doe* d. *Harvey* v. *Francis*, 2 M. & Rob. 57, the lessor of the plaintiff proved payment of rent—the defendant proposed to put in an answer in Chancery, in which he had sworn that he had no real interest in the premises, but had acted as agent for a body of adventurers. It was objected that the defendant was estopped from disputing the title of a person to whom he had paid rent. The objection, however, was overruled by Mr. J. *Patteson*, who said 'that where a tenancy was attempted to be established by mere payment of rent, without any proof of an actual demise, or of the tenant's having been let into possession by the person to whom the payment was made, evidence is always admissible on the part of the tenant to explain the payment of rent, and to show on whose behalf such rent was received.'" See also *Brook* v. *Biggs*, 2 Bingh. N. C. 272, and the judgment of *Patteson*, J., in *Hall* v. *Butler*, 2 P. & D. 374.

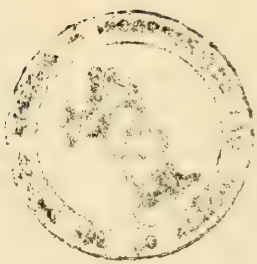
However, if the tenant cannot show some special reason to the contrary, he will be concluded by *payment of rent*. In *Cooper* v. *Blandy*, 1 Bingh. N. C. 45, two persons, under whom the plaintiff in replevin claimed, had paid rent to the defendant,—"Whether or not," said the L. C. J. delivering judgment, "such a payment is, in all cases, and, at all events, an estoppel, which precludes the occupier from showing that some other person is entitled, we need not decide here. In *Rogers* v. *Pitcher*, it was held that, under some circumstances, it may not be an estoppel. But it is not pretended here that any other person is entitled to the rent; and after two successive tenants, under whom the plaintiff comes into possession, have admitted the defendant's title, we are called on to say he has none. Before calling on us to come to any such conclusion, the plaintiff should, at least, show that he paid the rent to the defendant by mistake, and that some other person was entitled to receive it."—*Bosanquet*, J., in delivering his judgment, cited the expressions of *Bayley*, J. in *Panton* v. *Jones*, 3 Camp. 372,—"I have no doubt that submitting to a distress acknowledges the tenancy. The landlord after distraining cannot bring an ejectment; and the occupier, if he does not replevy, is, I think, precluded from denying the title of the landlord." See also *Doe* v. *Plomer*, 9 Bingh. 41. In *Doe* d. *Nepean* v. *Budden*, 5 B. & A. 626, the court seems to have hinted in their judgment that the criterion would be, whether the person whose title the tenant seeks to set up be one whose name the landlord would be entitled to use in an ejectment. If this be the criterion, it is consistent with *Cooper* v. *Blandy*.

Estoppel by *admittance* is mentioned by Lord *Coke*, Co. Litt. 352 b, as one species of estoppel by matter of record. The roll of a manor is perhaps, however, scarcely to be called a record; and in the late case of *Doe* d *Nepean* v. *Budden*, 5 B. & A. 626, the objection to a tenant's disputing the title of the lord who had admitted him seemed to be rested by the court rather upon the ordinary principle by which a tenant is precluded from disputing his landlord's title.

Contrary to the feeling which seems to have pervaded the courts with regard to other classes of estoppel, their inclination appears to have been to extend the list of estoppels *in pais*, especially in mercantile transactions, where men are obliged to trust much to appearances. Thus, it has often been laid down, that the acceptor is precluded from disputing the drawer's ability, or, if after sight of the bill, handwriting; the indorsee from disputing that of any antecedent party to the bill;

Jenys v. *Fawler*, Str. 946; *Lambert* v. *Pack*, Salk. 127, L. Raym. 443; *Crichlow* v. *Parry*, 2 Campb. 182; the agent from questioning the title of his principal to the subject matter of the agency: *Gosling* v. *Birnie*, 7 Bingh. 339; *Holl* v. *Griffin*, 10 Bingh. 246; *White* v. *Bartlett*, 9 Bingh. 378; *Kieran* v. *Saunders*, 6 A. & E. 515. And see the general rule laid down in *Pickard* v. *Sears*, 6 A. & E. 475. "The rule of law is clear," said Lord *Denman*, delivering the judgment of the court in that case, "that where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." See the above principle affirmed in *Gregg* v. *Wells*, 2 P. & Dav. 296; and see *Sandys* v. *Hodgson*, 2 P. & Dav. 433.

The truth is, that the courts have been, for some time, favourable to the utility of the doctrine of estoppel, hostile to its technicality. Perceiving how essential it is to the quick and easy transaction of business, that one man should be able to put faith in the conduct and representations of his fellow, they have inclined to hold such conduct and such representations binding in cases where a mischief or injustice would be caused by treating their effect as revocable. At the same time, they have been unwilling to allow men to be entrapped by formal statements and admissions which were perhaps looked upon as unimportant when made, and by which no one ever was deceived or induced to alter his position. Such estoppels are still, as formerly, considered *odious*.



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2. Trover for cloths, deposited by the bankrupt previous to his bankruptcy with the defendant, a fuller, for the purpose of being dressed. Held, that the defendant was not entitled to detain them for his general balance for work done by him for the bankrupt previously to the bankruptcy, for that there was no mutual credit within Stat. 5, G. 2, c. 30, sec. 28. *Rose* v. *Hart*, 172.

3. Right of assignees to things in bankrupt's order and disposition. See *Fixtures*, 2.

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A., a creditor of B. to 115*l.* 3*s.* 8*d.*, took his bill for 20*l.* on C., who had not then nor afterwards any effects of B. in his hands. The bill, when due, was dishonoured, and no notice thereof was given by A. to B.; still A.'s demand on the bill was not discharged; but he may sue out a commission of bankrupt against B., and his debt will support it. *Bickerdike* v. *Bollman*, 22.

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1. If a person have peculiar means of knowing a fact, and make a declaration or written entry of that fact which is against his interest at the time, it is evidence of the fact as between third persons after his death. *Higham* v. *Ridgway*, 183.

2. The defendant may give in evidence the declarations or admissions of the plaintiff on the record, although such plaintiff be only a trustee for a third person. *Bauerman* v. *Radenius*, 228.

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A., in consideration of natural love and 100*l.* by deeds of lease and release, granted, released, and confirmed certain premises, after his own death, to his brother B. in tail, remainder to C., the son of another brother of A. in fee; and he covenanted and granted that the premises

should, after his death, be held by B. and the heirs of his body, or by C. and his heirs, according to the true intent of the deed. Held, that the deed could not operate as a release, because it attempted to convey a freehold *in futuro;* but that it was good as a covenant to stand seised. *Roe* v. *Tranmarr*, 288.

DEFAMATION.

To print of any person that he is a swindler is a libel, and actionable. A justification of such charge must state the particular instances of fraud by which the defendant means to support it.

It is not necessary, in order to maintain an action of libel, that the imputation should be one which, if spoken, would be actionable as slander. *J'Anson* v. *Stuart*, 30.

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FACTOR.

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FALSE REPRESENTATION.

A false affirmation made by the defendant with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action on the case in the nature of deceit. In such an action it is not necessary that the defendant should be benefited by the deceit, or that he should collude with the party who is. *Pasley* v. *Freeman*, 55.

FIXTURES.

1. A tenant in agriculture, who erected at his own expense, and for the mere necessary and convenient occupation of his farm, a beast-house, carpenter's shop, fuel-house, cart-house, pump-house, and fold-yard wall, which buildings were of brick and mortar, and tiled, and let into the ground, cannot remove the same, though during his term, and though he thereby left the premises in the same state as when he entered. There appears to be a distinction between annexations to the freehold of that nature for the purpose of trade, and those made for the purpose of agriculture, and better enjoying the immediate profits of the land, in favour of the tenant's right to remove the former: that is, where the superincumbent building is erected as a mere accessary to a personal chattel, as an engine; but where it is accessary to the realty, it can in no case be removed. *Elwes* v. *Mawe*, 99.

2. A., B., and C., partners and distillers, occupied certain premises leased to A. and another, and used in common in the trade, the stills, vats, and utensils necessary for carrying it on, the property of which stills, &c. afterwards appeared to be in A. On the dissolution of the partnership, which was a losing concern, it was agreed that C., and one J., should carry on the business on the premises; and by deed between the two last and A., it was covenanted and agreed, that A. should withdraw from the premises, and permit C. and J. to use, occupy, and enjoy the distil-house and premises, paying the reserved rent, &c., and the several stills, vats, and utensils of trade specified and numbered in a schedule annexed, in consideration of an annuity to be paid by C. and J. to A. and his wife and the survivor; with liberty for C. and J., on the decease of A. and his wife, to purchase the distil-house and premises for the remainder of A.'s term, and the stills, vats, &c. mentioned in the schedule; and C. and J. covenanted to keep the stills, vats, and utensils in repair, and deliver them up at the time, if not purchased; and there was a proviso for re-entry, if the annuity were two months in arrear. Under this, C. and J. took possession of the premises, with the stills, vats, and utensils, and carried on the business as before; and made payments of the annuity, which afterwards fell in arrear more than two months; but A.'s widow and executrix, who survived him, did not enter, but brought an action for the arrears, which was stopped by the bankruptcy of C. and J., who continued in possession of the stills, vats, and utensils, on the premises. On a question, whether such stills, vats, and utensils, so continuing in possession of C. and J., the new partners, and used by them in their trade in the same manner as they had been by the former partners, of whom A. the owner was one, passed under the Stat. 21 Jac. 1, c. 19, s. 10 and 11, to the assignees of C. and J. as being in the possession, order, and disposition of the bankrupts at the time of their bankruptcy as reputed owners? and nothing appearing to the world to rebut the presumption of true ownership in the bankrupts arising out of their possession and reputed ownership (of which reputed ownership the jury are to judge from the circumstances), held—

1. That the stills which were fixed to the freehold did not pass to the assignees under the words "goods and chattels" in the statute.

2. That the vats, &c., which were not so fixed, did pass to the assignees, as being left by the true owner in the possession, order, and disposition (as it appeared to the eye of the world) of the bankrupts as reputed owners.

3. That the case would have admitted of a different consideration, if there had been a usage in the trade for the utensils of it to be let out to the traders, as that might have rebutted the presumption of ownership arising from the possession and apparent order and disposition of them. *Horn* v. *Baker*, 122.

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The property of a highway is in the owner of the soil, subject to an easement for the benefit of the public; therefore a plea-in-law of an attorney for taking cattle damage feasant, that the cattle escaped from a public highway into the *locus in quo*, through the defect of fences, must show that they were passing on the highway when they escaped; it is not enough to show that they were in the highway when they escaped. *Dovaston* v. *Payne*, 90.

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LANDLORD AND TENANT.

1. If a landlord lease for seven years by parol, and agree that the tenant shall enter at Lady-day and quit at Candlemas, though the lease be void by the Statute of Frauds as to the duration of the term, the tenant holds under the terms of the lease in other respects, and therefore the landlord can only put an end to the tenancy at Candlemas. *Doe* d. *Rigge* v. *Bell*, 72.

2. Though, by the Statute of Frauds, it is enacted, that all leases by parol for more than three years shall have the effect of leases at will only, such a lease may be made to enure as a tenancy from year to year. *Clayton* v. *Blakey*, 74.

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1. If a factor sell goods as his own, and the buyer knows nothing of any principal, the buyer may set off any demand he may have on the factor against the demand for the goods made by the principal. *George* v. *Clagett*, 77.

2. If the seller of goods, knowing at the time that the buyer, though dealing with him in his own name, is in truth the agent of another, elect to give the credit to such agent, he cannot afterwards recover against the known principal; but if the principal be not known at the time of the purchase made by the agent, it seems, that when discovered, the principal or the agent may be sued at the election of seller, unless where, by the usage of trade, the credit is understood to be confined to the agent so dealing, as particularly in the case of principals residing abroad. *Paterson* v. *Gandasequi*, 198.

3. A., a merchant, purchases goods of B. for the use of C., who is present, and selects the goods, and stipulates with B. the price and other terms of the purchase; A. credits B. with the amount, and debits C. with the amount and a commission; B. debits A. in his books and invoices; B. cannot recover the price of the goods against C. *Addison* v. *Gandasequi*, 204.

4. At the time of making a contract of sale, the party buying the goods represented that he was buying them on account of persons resident in Scotland, but did not mention their names, and the seller did not inquire who they were, but afterwards debited the party who purchased the goods. Held, that the seller might afterwards sue the principals for the price. *Thomson* v. *Davenport*, 212.

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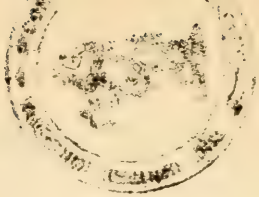

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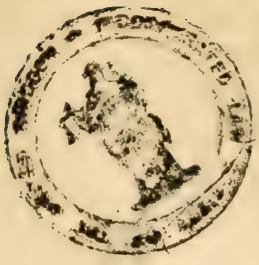

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